IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973 No. 35 Original

UNITED STATES OF AMERICA,

Plaintiff

v.

STATES OF MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, NEW YORK, NEW JERSEY, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA and GEORGIA,

Defendants

Report of Albert B. Maris, Special Master

August 27, 1974

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

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A. HISTORY OF THE PROCEEDING

1. THE BASIC QUESTION INVOLVED

The basic question involved in this litigation is whether the right to explore and exploit the natural resources of the seabed and subsoil of that portion of the continental shelf underlying the Atlantic Ocean which is more than three geographical miles seaward from the coastline of the United States belongs to the United States or to the defendant States or any of them.

2. INCEPTION OF THE LITIGATION

The present litigation had its inception on April 1, 1969 when the United States filed in this Court a motion for leave to file a complaint against the States of Maine, New Hampshire, Massachusetts, Rhode Island, New

York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida, the 13 States bordering on the Atlantic Ocean. The jurisdiction of this Court was invoked under Article III, section 2, clause 2, of the Constitution of the United States and 28 U.S.C. §1251(b)(2). The State of Maine filed a brief in opposition to the motion, in which the other 12 States joined. The State of Virginia, in addition, filed a separate brief in opposition. On June 16, 1969 this Court granted the motion, 395 U.S. 955, and the complaint of the United States was formally filed.

3. Complaint of the United States

The complaint sets up separate causes of action by the United States against each of the 13 defendant States. It alleges that the United States was entitled prior to the enactment of the Submerged Lands Act of May 22, 1953, 67 Stat. 29, to exercise, to the exclusion of the defendant States, sovereign rights over the seabed and subsoil underlying the Atlantic Ocean seaward from the ordinary low-water mark and outer limit of inland waters on the coast to the outer edge of the continental shelf, for the purpose of exploring the area and exploiting its natural resources. It is further alleged that by the Submerged Lands Act the United States granted to the defendant States the title to and ownership of the submerged lands and natural resources lying in the Atlantic Ocean within their respective boundaries, but not extending seaward more than three geographic miles from the ordinary low-water mark or from the outer limit of inland waters. Nonetheless, asserts the complaint, the defendant States claim some right, title or interest adverse to the United States in the seabed and subsoil of the continental shelf more than three geographic miles seaward from their respective coastlines, and the State of Maine has purported to grant exclusive oil and gas exploration and exploitation rights in approximately 3,300,000 acres of land submerged in the Atlantic Ocean

in the area in controversy. The complaint goes on to assert that the United States remains entitled, to the exclusion of the defendant States, to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three geographic miles seaward from the coastline to the outer edge of the continental shelf for the purpose of exploring the area and exploiting its natural resources, that the United States is entitled to an accounting for all sums of money derived by the defendant States from that area which are properly owing to the United States, that by the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462, 468, Congress declared "the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf" and to that end provided for the issuance of mineral leases in that area by the Secretary of the Interior to private operators, and that the defendant States are interfering with and obstructing the exploration, leasing and development of those mineral resources by the United States and will continue to do so to its great and irreparable injury, unless the rights of the United States are declared and established by this Court. In the case of Florida the complaint asserts that the Atlantic Ocean includes the Straits of Florida. The complaint seeks a declaratory decree and a direction for an accounting.

4. ANSWERS OF THE DEFENDANT STATES

All the defendant States filed answers. In addition, the State of Florida subsequently filed an amended answer. The answers differ somewhat in form but in essence they all deny the rights asserted by the United States. The answer of the State of Maine specifically admits that it has granted to a private corporation a conditional license to explore for minerals, oil and gas in, and to take the same from, certain lands submerged in the Atlantic Ocean, some portion of which may be more than three geographic miles from its coastline, but denies that it has received

any sums from that area for which any accounting, even if due, could be made.

All the defendant States except the State of Florida assert by way of affirmative defense that as successors in title to certain grantees of the Crown of England (and, in the case of New York, also of the Crown of Holland) they are entitled to exercise dominion and control over the exploration and development of such natural resources as may be found in, on or about the seabed and subsoil underlying the Atlantic Ocean adjacent to their respective coastlines to the exclusion of any other political entity whatsoever, including the United States, subject only to the limits of national seaward jurisdiction established by the United States, that their power to exercise such dominion and control is not prohibited by the Constitution of the United States and has never been delegated to the United States, and that any attempt by the United States to assert such power with respect to the defendant States violates the Tenth Amendment to the Constitution and is void.

Additional defenses are asserted by certain of the States. Rhode Island asserts that it acquired *dominium* over the submerged lands and the waters of the Atlantic Ocean adjacent to its coastline by virtue of its declaration of independence from the British crown on May 4, 1776. The State of North Carolina asserts that in 1947 its General Assembly by statute declared that the eastern limit and boundary of the State on the Atlantic coast has "always been . . . one marine league eastward from the Atlantic seashore, measured from the extreme low water mark", that this declaration is based upon the provision in its 1868 Constitution that the "limits and boundaries of the State shall be and remain as they now are", which requires a determination of its original eastern boundary at the time of its entry into the Union in 1789. The State of Georgia alleges that any rights which the United States may have had in the disputed area were transferred to the State by the boundary settlement agreement of 1802.

The affirmative defense set up by the State of Florida is quite different from that raised by the other defendant States. In its amended answer it alleges that by the Act of June 25, 1868, 15 Stat. 73, Congress approved the marine boundaries of the State described in Article I of its Constitution of 1868, which boundaries, it asserts, run more than three miles seaward from its coastline in certain parts of the Atlantic Ocean, and that Congress thereby granted to the State whatever interest the United States possessed in the maritime territory within those boundaries. The amended answer denies that the Straits of Florida are a part of the Atlantic Ocean and asserts that they are an arm of the Gulf of Mexico or, in the alternative, that the Florida Keys and the Marquesas and Dry Tortugas Islands are situated in the Gulf of Mexico and that the State is, therefore, entitled to a southern seaward boundary of three leagues from its coastline wherever located in this area.

5. MOTION OF THE UNITED STATES FOR JUDGMENT AND REFERENCE TO SPECIAL MASTER

On January 14, 1970 the United States filed a motion for judgment on the ground that there is in the litigation no genuine issue as to any material fact. On January 30, 1970 the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina and Virginia filed a joint motion submitting that the preferable course would be to refer the case to a master to take evidence, make findings of fact, conclusions of law and recommendations for a decree with special instructions to consider and report upon the scope and validity of the historical claims of the States to the submerged lands in question. The States of New York, New Jersey and Georgia subsequently filed similar motions.

This Court did not act on the motion for judgment, but on June 8, 1970 entered an order appointing the undersigned as special master in this case "with authority to fix

the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for." The order directed the master to submit such reports as he may deem appropriate. The specific directions requested by the States were not given, however. 398 U.S. 947.

6. MOTION OF STATE OF FLORIDA FOR SEVERANCE

On February 9, 1970 the State of Florida moved to sever the cause of action against it from those against the other 12 defendant States. On November 16, 1970 the motion for severance was referred to me as special master. 400 U.S. 914. On January 8, 1971 I granted Florida leave to file an amended answer and the amended answer was filed in this Court on February 4, 1971. On February 19, 1971 I held a hearing on the motion for severance. It was argued that the cause of action asserted against Florida presented factual questions applicable to that State alone and did not involve questions of either fact or law which were common to the other defendant States.

It appeared that in the case of *United States v. States of Louisiana, Texas, Mississippi, Alabama and Florida,* No. 9 Original, in which the rights of the State of Florida in the seabed off the Gulf coast of the State had been adjudicated, 1960, 363 U.S. 121, 364 U.S. 502, supplemental proceedings would be necessary to define more precisely the boundary of the State which delimited its seabed rights on that coast. It also appeared that if the proceedings against Florida in No. 35 with respect to the Atlantic coast were severed, it would be appropriate to consolidate them with the supplemental proceedings against Florida with respect to the Gulf coast, if authorized in No. 9.

Accordingly, on March 29, 1971, I filed a report recommending the severance and consolidation. On June 28, 1971 this Court entered orders granting the severance

and consolidating the severed cause of action with the supplemental proceedings which it authorized in No. 9. The consolidated proceedings were then designated as No. 52 Original, and were also referred to the undersigned as special master. 403 U.S. 949, 950.

In its amended answer filed prior to the severance Florida had alleged a counterclaim for money damages and had demanded a jury trial of the counterclaim. On March 29, 1971 the United States filed a motion to dismiss the counterclaim and deny the demand for a jury trial. On June 28, 1971 this Court referred that motion to me as special master, 403 U.S. 949. I held a hearing on the motion on October 22, 1971 and filed a report recommending that it be granted. On December 20, 1971 this Court adopted my report. 404 U.S. 998. Thereafter the consolidated case proceeded before the special master to completion. My final report as master in No. 52 Original was lodged with this Court on January 18, 1974 and ordered filed on February 19, 1974. 415 U.S. 905.

7. Proceedings of the Special Master

Following the reference to me of case No. 35 Original, I held prehearing conferences in Philadelphia with counsel for all parties on July 28, 1970, October 27, 1970 and January 8, 1971, and following each conference made an order embodying the agreements reached with respect to the procedure to be followed during the course of the proceedings. A further procedural order was made on May 24, 1971. To reflect the severance of the cause of action against the State of Florida from No. 35 Original, which had been ordered on June 28, 1971, and to consolidate the prehearing orders previously made into a single procedural order, on August 27, 1971 I made a consolidated and revised procedural order. On March 7, 1974 I amended paragraph 14 of that order. A copy of the consolidated and revised procedural order as amended is included as an appendix to this report.

Under date of February 8, 1971 the United States served a document entitled "First Formal Interrogatories" on each defendant State. Some of the defendant States answered these interrogatories but the defendant States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland and Virginia filed, in common, objections thereto. On March 12, 1971 I made an order sustaining the objections because the interrogatories were not appropriate in view of the pre-hearing orders which had been made in the case.

Six separate sessions of hearings for the receipt of evidence were held in Philadelphia beginning May 24, 1971 and ending January 24, 1973, aggregating 14 hearing days. Ten witnesses were heard and approximately 1,260 exhibits were received in evidence. The transcript totals 2,800 pages. Throughout my labors I have been greatly aided by the able counsel who have conducted the case for the parties. Their thorough and painstaking work in the presentation of the evidence, both by way of documents and expert testimony and of exhaustive briefs of argument, has been most helpful to me. Their work has accorded to the highest standards of the profession and I wish to acknowledge it with gratitude.

B. THE MOTION OF THE UNITED STATES FOR JUDGMENT

As we have seen, the United States early in this litigation filed with this Court a motion for judgment on the ground that there is no genuine issue as to any material fact and the United States is entitled to judgment as a matter of law. That motion was, however, not then acted upon by the Court which, instead, pursuant to motions by the defendant States, referred the proceeding to me as special master to direct subsequent proceedings, take evidence and make report thereon. I have assumed that this action by the Court was not intended to be con-

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strued as a denial of the motion for judgment but rather as an indication of the Court's desire for a full development of and report on the facts in the light of which to consider the issues involved. This was doubtless in accord with the established policy of the Court in controversies of this magnitude between the federal government and the sovereign states. *United States v. Texas*, 1950, 339 U.S. 707, 715. I shall accordingly later in this report consider the evidence offered by the parties and make findings with respect to the facts established thereby. At the outset, however, I deem it incumbent upon me to consider the merits of the motion for judgment.

The motion is based upon the proposition that this Court in *United States v. California*, 1947, 332 U.S. 19; *United States v. Louisiana*, 1950, 339 U.S. 699, and *United States v. Texas*, 1950, 339 U.S. 707, determined that the United States, rather than the States involved, as an attribute of national sovereignty had paramount rights in the submerged lands and natural resources of the territorial sea, seaward of the coastline, that these cases have not been overruled or their authority impaired by subsequent decisions of the Court, that the rule which they lay down applies to all the coastal states, and that it applies with even greater force to the seabed and subsoil of the continental shelf lying seaward of the three-mile limit of the territorial sea. The defendant States urge, on the contrary, that both the reasoning and result of the *California*, *Louisiana* and *Texas* cases have been repudiated by Congress and by subsequent decisions of this Court. They argue, moreover, that those cases were in any event wrongly decided and should now be overruled. It may well be, as the defendant States urge, that this Court, in granting the reference to a special master for a fact finding inquiry, indicated its willingness to reopen and review the issues decided by the *California*, *Louisiana* and *Texas*

cases. However that may be, it is obviously for the Court rather than its special master to undertake such a review. It is for me, as I understand my role, to apply to the facts of this proceeding the law as it now exists, not as the defendant States would like to see it revised. I pass, therefore, to the consideration of the *California, Louisiana* and *Texas* cases.

In *United States v. California*, 1947, 332 U.S. 19, this Court was called upon to determine the respective rights of the State and the federal government in the seabed and subsoil of the three-mile belt of marginal sea off the coast of California. California contended that the three-mile marginal sea was within the original boundaries of the State approved by Congress, that the 13 original states had acquired from the English crown ownership of all lands under the navigable waters within their respective boundaries including all lands under the sea within at least three miles of their respective coasts and that California was entitled under the Constitution to stand in this regard on an equal footing with the original states. This Court rejected the contentions of California. After reviewing a multitude of cited documents,* consisting of a great many, but not all, of those included in the present record, it held that the equal footing doctrine did not support the State's claim because the 13 original states had not themselves acquired as colonies and did not separately own the natural resources of the seabed of the adjacent territorial sea. The Court said [pp. 31-34]:

> "It would unduly prolong our opinion to discuss in detail the multitude of references to which the able briefs of the parties have cited us with reference to the evolution of powers over marginal seas exercised by adjacent countries. From all the wealth of material supplied, however, we cannot say that the thirteen

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* Neither party suggested any necessity for the introduction of evidence. [332 U.S. at p. 24]

original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it. *Cf. United States v. Curtiss-Wright Export Corp.*, 229 U.S. 304, 316.

"At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. Some countries, notably England, Spain, and Portugal, had, from time to time, made sweeping claims to a right of dominion over wide expanses of ocean. And controversies had arisen among nations about rights to fish in prescribed areas. But when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion. Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth.

"It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality. Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world, although as late as 1876 there was still considerable doubt in England about its scope and even its existence. See

> *The Queen v. Keyn*, 2 Ex. D. 63. That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. *Cunard Steamship Co. v. Mellon*, 262 U.S. 100, 122-124. And this assertion of national dominion over the three-mile belt is binding upon this Court. See *Jones v. United States*, 137 U.S. 202, 212-214; *In re Cooper*, 143 U.S. 472, 502-503."

Both because acquisition of the territorial sea had been accomplished by the national government rather than by the states and because the territorial sea was primarily affected by national concern for defense, international relations, and foreign commerce, the Court held that rights in the submerged lands and resources of the territorial sea, unlike those in inland navigable waters which belonged to the states under the rule of *Pollard v. Hagan*, 1845, 3 How. 212, should be considered attributes of national sovereignty rather than of state sovereignty. The Court concluded [pp. 38-39]:

> "Now that the question is here, we decide for the reasons we have stated that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."

In *United States v. Louisiana*, 1950, 339 U.S. 699, and *United States v. Texas*, 1950, 339 U.S. 707, this Court followed and applied the rule of the *California* case. In the *Louisiana* case the State sought to differentiate its case from that of California because a Louisiana statute of 1938 had purported to extend the State's boundary seaward 27 miles from the shoreline. This Court rejected the distinction, saying [p. 705]:

> "We intimate no opinion on the power of a State to extend, define, or establish its external territorial limits or on the consequences of any such extension *vis a vis* persons other than the United States or those acting on behalf of or pursuant to its authority. The matter of state boundaries has no bearing on the present problem."

It pointed out that the predominance of national interests over state interests increases rather than diminishes as one moves farther seaward, saying [pp. 705-706]:

> "If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so. So far as the issues presented here are concerned, Louisiana's enlargement of her boundary emphasizes the strength of the claim of the United States to this part of the ocean and the resources of the soil under that area, including oil."

Texas likewise sought to differentiate its case from that of California. It asserted that prior to its admission to the union as a state, it had been an independent republic which by statute claimed a three-league marginal sea where it exercised all the elements of external as well as domestic sovereignty. This Court rejected that distinction also, holding that when Texas became a state of the union, it necessarily did so on an equal footing with the original states, so that its relinquishment of national sovereignty to the federal government carried with it all the attending attributes of that sovereignty, including paramount rights in the submerged lands and resources of the marginal sea.

The rule laid down by the *California* case that the

federal government has rights in the seabed and its resources underlying the territorial sea which are paramount to any rights claimed by the states is, I believe, based upon two grounds. The first and, as it seems to me, the most fundamental ground is that since the territorial sea is primarily affected by national concern for defense, international relations and foreign commerce, all of them being aspects of external sovereignty, the "protection and control of it has been and is a function of national external sovereignty" [332 U.S. at p. 34], which in our federal union and under our Constitution is vested in the federal government to the exclusion of the states, and that an incident to that sovereignty is full dominion over the resources of the soil under the water of the territorial sea. It is true, of course, that the Court also relied in this regard on its finding that the concept of a territorial sea arose and gained international acceptance after the formation of the union and largely as a result of the efforts of the federal government.

The other ground upon which this Court relied in the *California* case was that California's claim to rights in the seabed of the territorial sea was not supported by its reliance upon its Enabling Act, 9 Stat. 452, under which it was admitted into the union "on an equal footing with the original States in all respects whatever", since, on the basis of the historical material submitted to it, the Court concluded that the 13 original states did not as colonies separately acquire ownership of the three-mile belt or the soil under it. It is true, of course, as the defendant States argue, that this finding, which if adhered to by this Court would effectively foreclose against the present defendant States the factual issues raised by them in the present proceeding, does not bar their claims here under the doctrine of *res judicata* for they were not parties to the *California* case and did not intervene in that case. I note, however, that the States of Massachusetts, New Jersey and New York did participate, directly or indirectly, as *amici curiae* in that case. Also many of the historical documents,

although admittedly not all, which have been introduced as exhibits in this proceeding were before this Court in the *California* case. Accordingly, it appears to me that while litigation of the issues of fact raised by the affirmative defenses of the defendant States in the present proceeding is not barred by the doctrine of *res judicata*, the rule of law laid down in the *California*, *Louisiana* and *Texas* cases is applicable to the present case under the doctrine of *stare decisis* unless it has been modified or overruled by later decisions or legislation. I note that in footnote 140 to its opinion in the second *Louisiana* case, *United States v. Louisiana et al.*, 1960, 363 U.S. 1, 83, this Court said with respect to the defense of the State of Mississippi, one of the defendant States in that case:

> "140. On June 5, 1950, the date of this Court's decision in the *Louisiana* and *Texas* cases, all coastal States were put on notice that the United States was possessed of paramount rights in submerged lands lying seaward of their respective coasts. The Submerged Lands Act, passed in 1953, by which parts of those lands were relinquished to the States, also forgave any monetary claims arising out of the States' prior use of the lands so relinquished. But the United States remains entitled to an accounting for all sums derived since June 5, 1950, from lands not so relinquished.
>
> "Mississippi contends that it is not liable for an accounting, since it was never party to a suit decreeing the United States' rights in offshore lands. However, principles announced in the 1950 *Louisiana* and *Texas* cases are plainly applicable to all coastal States, and Mississippi was put on notice by the decrees in those cases."

An examination of the later decisions of this Court satisfies me that the rule of the *California*, first *Louisiana* and *Texas* cases has not been overruled or impaired. On

the contrary, this Court in the second Louisiana case, 1960, 363 U.S. 1, stated in its opinion [p. 7] that the rule of those cases is "admittedly applicable to all coastal States" and in footnote 140 to that opinion, as we have seen, that the "principles announced in the 1950 *Louisiana* and *Texas* cases are plainly applicable to all coastal States". The defendant States urge that in the second *Louisiana* case and in *United States v. Florida*, 1960, 363 U.S. 121, this Court modified the rule of the *California* case when it approved the claims of Texas and Florida to state boundaries three marine leagues seaward from the coastline, qualifying them for ownership of the seabed and its resources within those limits under the provisions of the Submerged Lands Act. By this action, they argue, the Court indicated that it no longer regarded seabed rights as inseparable from the external sovereignty of the federal government over the surface. I do not agree with this analysis, finding nothing in the *California*, first *Louisiana* or *Texas* cases to support the basic premise underlying the defendants' argument. It is true that this Court in the *California* case said that dominion over the resources of the soil under the water of the territorial belt of the sea is an incident of the paramount rights of the federal government in that belt of the sea. But the Court did not indicate that the federal government by Act of Congress might not, as it did by the subsequently enacted Submerged Lands Act, grant to the riparian states rights to the resources of the federal area, subject to the reservation by the federal government of its rights and powers of regulation and control for purposes of commerce, navigation, national defense, and international affairs. Moreover, this Court's discussion in the *California* case [332 U.S. at p. 38] of the case of *Skiriotes v. Florida*, 1941, 313 U.S. 69, indicated that it recognized that a riparian state might have an interest in a resource of the territorial sea, in that case the sponge fishery, with which it might deal in the absence of conflicting federal legislation and, I would add, *a fortiori*

when expressly so authorized by federal legislation such as the Submerged Lands Act. And I may also add that this Court has recently made it quite clear that a coastal state under its police power may legislate in furtherance of its special concern with respect to oil spillage in its territorial waters. *Askew v. American Waterways Operators, Inc.*, 1973, 411 U.S. 325.

This brings me to consider the Submerged Lands Act which was approved May 22, 1953, 67 Stat. 29, 43 U.S.C. §§ 1301 et seq., following the decisions of this Court in the *California*, first *Louisiana* and *Texas* cases. The defendant States strongly argue that by the Act Congress repudiated the underlying basis of the decisions in those cases which, they assert, was that ownership of the seabed of the territorial sea was required to be vested in the federal government in order to enable it to carry out its responsibilities in conducting the foreign affairs and defense of the nation. As I have already indicated, however, I do not read the cases in question as so holding. It is true that many riparian states had previously assumed that they did have rights in the territorial sea and its seabed resources adjacent to their shores under the rule of *Pollard v. Hagan*, 1845, 3 How. 212, and that a great deal of opposition to the California decision developed, culminating in the enactment of the Submerged Lands Act. It is also true that in the Congressional committee reports on the bill which became the Act the decision was strongly criticized as out of line with decisions of the past and it was indicated that the purpose of the bill was "to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution." S. Rep. No. 133, 83d Cong., 1st Sess., p. 8. The background and legislative history of the Act are discussed at length by this Court in the second *Louisiana* case, 1960, 363 U.S. at pp. 17-24.

This Court in the second *Louisiana case*, 1960, 363 U.S. 1, 8-10, summarized the provisions of the Submerged Lands Act as follows:

"The purposes of the Submerged Lands Act are described in its title as follows:

> " 'To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries.'

"To effectuate these purposes the Act, in pertinent part—

"1. relinquishes to the States the entire interest of the United States in all lands beneath navigable waters within state boundaries (§ 3, 43 U.S.C. § 1311);

"2. defines that area in terms of state boundaries 'as they existed at the time [a] State became a member of the Union, or as heretofore approved by the Congress,' not extending, however, seaward from the coast of any State more than three marine leagues in the Gulf of Mexico or more than three geographical miles in the Atlantic and Pacific Oceans (§ 2, 43 U.S.C. § 1301);

"3. confirms to each State a seaward boundary of three geographical miles, without 'questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress' (§ 4, 43 U.S.C. § 1312); and

> "4. for purposes of commerce, navigation, national defense, and international affairs, reserves to the United States all constitutional powers of regulation and control over the areas within which the proprietary interests of the States are recognized (§ 6(a), 43 U.S.C. § 1314); and retains in the United States all rights in submerged lands lying beyond those areas to the seaward limits of the Continental Shelf (§ 9, 43 U.S.C. § 1302)."

Justice Harlan, speaking for this Court in the second *Louisiana* case, epitomized the Congressional intent reflected by the Act, as follows:

> "By that Act the United States relinquished to the coastal States all of its rights in such lands within certain geographical limits, and confirmed its own rights therein beyond those limits." 363 U.S. at pp. 6-7.

It is quite obvious that Congress could reserve to the federal government all the rights to the seabed of the continental shelf beyond the three-mile territorial belt of sea (or three leagues in the case of certain Gulf states) only upon the basis that it already had the paramount right to that seabed under the rule laid down in the *California* case. For although that rule was announced with respect to the seabed of the three-mile territorial belt of sea, which was the only area involved in the *California* case, its rationale applies *a fortiori* to the area of the sea beyond that belt as this Court specifically pointed out in the first *Louisiana* case, 339 U.S. 699, 705.

What has been said is applicable, as well, to the special defenses raised by the States of Rhode Island and North Carolina to which I have already referred. The special defense raised by the State of Georgia requires further comment, however. That defense is that any rights of the United States in the seabed off the Georgia coast were transferred to the State by the boundary settlement

agreement of April 24, 1802 between the United States and the State of Georgia. The 1802 agreement was negotiated and signed by federal and state commissioners pursuant to the Acts of Congress of April 7, 1798, 1 Stat. 549, and May 10, 1800, 2 Stat. 69, and the Georgia Act of February 15, 1799, Digest of the Laws of Georgia (1801) p. 726. These federal statutes empowered the federal commissioners to make a final settlement of the conflicting claims of the United States and Georgia to lands west of the Chattahoochee River, and other lands claimed by Georgia, upon such terms as to them should appear reasonable. The Georgia Act required that the United States extinguish Indian title to certain lands in Georgia and cede those lands to the State.

The agreement ceded to the United States the lands west of the Chattahoochee River in exchange for certain undertakings by the United States. These included payments to be made from the proceeds of the ceded lands, extinguishment of Indian titles in Georgia and cession to Georgia of the claim, right or title of the United States to the jurisdiction or soil of any lands "lying within the United States" south of the southern boundaries of Tennessee, North Carolina and South Carolina and east of the western lands ceded to the United States by the agreement. Neither the federal commissioners in submitting the agreement to the President, nor the President in submitting it to Congress, gave any hint that it was the purpose to cede to Georgia any federal rights in the seabed. [Ga. Ex. 8] Lands beneath navigable waters, unless they are granted in specific terms, are deemed to remain attached to the sovereignty to which by their nature they appertain. *Martin v. Waddell*, 1842, 16 Pet. 367; *Massachusetts v. New York*, 1926, 271 U.S. 65. In the case of the seabed beneath the ocean seaward of the coastline this Court has held that sovereignty to be the national government, not the coastal state. *United States v. California*, 1947, 332 U.S. 19. But even if it were assumed, although

I find no basis for doing so, that by the agreement of 1802 Georgia received title to the seabed off its coast this would not sustain Georgia's claim. For it could not be held that such title extended out into the area here in controversy, since no one contends that in 1802 the United States claimed any jurisdiction over or title to the seabed of the continental shelf beyond the three-mile belt of territorial sea.

I conclude that the rule announced in the *California*, first *Louisiana* and *Texas* cases and approved and declared to be applicable to all coastal states by the second *Louisiana* case, 363 U.S. 1, 7, remains in full vigor and applies to all the defendant States in this proceeding, foreclosing the issues of fact raised by them and requiring as a matter of law the entry of judgment for the United States on its motion. This conclusion is, of course, subject to the possibility that this Court, as urged by the defendant States, may decide to reconsider the rule laid down by the *California*, first *Louisiana* and *Texas* cases in the light of the facts developed by the parties in the present proceeding. I, therefore, proceed to the consideration of those facts.

C. DISCUSSION

1. Preliminary Considerations

Basic to the case of the defendant States is their contention that this Court erred in its finding in the *California* case [332 U.S. at p. 31] that the 13 original colonies did not separately acquire ownership to the adjacent sea or the soil under it, even if they did acquire elements of the sovereignty of the English crown by their revolution against it, and [332 U.S. at p. 32] that neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document submitted to this Court, showed a purpose to set apart a three-mile belt of marginal sea for colonial or state ownership. They further contend that this Court erred in holding [332 U.S.

at pp. 32-33] that there is no substantial support in history for the idea that the colonists wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth. On the contrary, the defendant States have sought to prove in the present case:

(1) that English law and practice prior to and during the seventeenth and eighteenth centuries recognized the sovereignty and ownership by the crown of the English seas and the seabed and subsoil thereof and was not inconsistent with the international law of the period;

(2) that the American colonial charters created territorial seas and conveyed maritime sovereignty and dominion;

(3) that rights of sovereignty and dominion were exercised over the American territorial sea during the colonial period;

(4) that at the American revolution the states individually succeeded to the maritime territorial sovereignty and dominion both of their predecessor colonial governments and of the British crown, and those rights were retained by them after the adoption of the Constitution; and

(5) that the exclusive rights of the states to the continental shelf have not been abandoned or extinguished since 1787.

In addition, the defendant States have introduced evidence which, they assert, establishes the invalidity of the conclusion of this Court in the *California* case [332 U.S. at pp. 34-36] that the exercise of sovereign powers granted to the federal government in the fields of foreign commerce, foreign affairs and national defense requires that the federal government have dominion over the marginal sea and rights to its seabed which are paramount to any claims of the states. They point to the opinion of their expert witness, Professor Lyman B. Kirkpatrick, Jr.,

that upholding the claims of the states would not inhibit or embarrass the federal government in carrying out its foreign affairs and defense responsibilities. However, I do not regard the conclusion in question to have been based upon a factual evaluation by this Court of the relative needs of the federal government in these areas as against the claims of the states. On the contrary, it appears to me to represent the statement of a purely legal principle, namely, that since the Constitution has allotted to the federal government jurisdiction over foreign commerce, foreign affairs and national defense it necessarily follows, as a matter of constitutional law, that as attributes of these external sovereign powers the federal government has paramount rights in the marginal sea. How those rights are to be exercised and by what entities in our federal system is, of course, a question of public policy for the Congress to decide, as it did by the Submerged Lands Act.

The principle is based, I believe, upon the inescapable physical fact that the sea is affected by the interests and activities of other nations in a very different way, and very much more directly and immediately, than is the land, and that the existence and preservation of our national rights in the marginal sea are largely dependent upon the ability of the federal government to carry out its responsibilities in the fields of foreign commerce, international relations and national defense. The land is in no sense comparable to the sea in this respect. For aliens may be, and frequently have been, wholly excluded from the land, whereas the sea, including the marginal sea, has been used by all the maritime nations of the world as a common avenue of commerce and a common source of fishing since the dawn of history. I should add that since this Court has thus held in the *California* case that the United States is vested, as a matter of constitutional law, with dominion over the marginal sea including paramount rights in the resources of the seabed, I do not regard it as within my province to question the ruling as the defendant States

ask me to do. If the ruling is to be departed from it is for the Court to do so and it would be presumptuous on my part as its special master to suggest such action.

Upon the questions of fact and of English and international law raised in the case a great deal of expert testimony and a large number of documents have been offered in evidence by the parties. From the consideration of this evidence, much of it conflicting, and of relevant matters of which judicial notice may be taken, I have made the findings of fact which appear as statements of fact in this report. In my discussion of these facts and of the questions of law involved I shall not attempt to discuss, or even mention, all the documents upon which the parties rely, since to do so would lengthen this report inordinately and unduly delay its completion. I shall confine myself in most instances to discussing only those which I regard as particularly significant or controlling.

In considering the facts it is important to bear in mind what is, and what is not, involved in this case. The sole question which is involved is whether the United States or the respective defendant States have the right to the exclusion of the other to explore and exploit the natural resources of the seabed and subsoil of the continental shelf beyond the three-mile limit of the territorial sea adjacent to the Atlantic coast. The case is not directly concerned with the question whether prior to the enactment of the Submerged Lands Act of 1953 the defendant States had jurisdiction over, title to or ownership of the seabed and subsoil of the continental shelf within the three-mile belt of territorial sea or the exclusive right to explore and exploit the resources of the seabed and subsoil in that area. For as to this question the Submerged Lands Act has "recognized, confirmed, established, and vested in and assigned to" the defendant States, *inter alia*, "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States [which the Act limited to a distance of three geographical miles from

the coastline and confirmed at that distance in the case of the original coastal states], and the natural resources within such lands and waters". It will be recalled that section 9 of the Submerged Lands Act provided that the Act should not affect the rights of the United States to the natural resources of that portion of the seabed and subsoil of the continental shelf lying seaward and outside of the area confirmed to the states by the Act and it expressly confirmed the jurisdiction and control of the United States over those natural resources. It will also be recalled that the jurisdiction and control of the United States over the seabed and subsoil of that portion of the continental shelf lying seaward of the area confirmed to the coastal states by the Submerged Lands Act was, shortly thereafter, expressly claimed by the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462, 43 U.S.C. §§ 1331 et seq.

I proceed, therefore, to consider the facts which are relevant to the question whether the defendant States have any right to explore and exploit the natural resources of the seabed and subsoil of that portion of the continental shelf lying beyond the three-mile limit, which have survived the enactment of the Submerged Lands Act.

2. English Law Prior to 1776

(a) *Preliminary discussion*

Our discussion begins with the English law of the sea in the centuries before 1776. On this subject the expert testimony of distinguished legal historians was offered by the parties together with a multitude of documents. This testimony as to the course of the English law and as to the significance of the documents relating thereto which are in evidence was sharply conflicting in a great many respects. I have accordingly tested the evidence and exhibits by what I believe to be the most reliable account of the history of the English claims to sovereignty of the sea in the period under discussion, namely, the work of

the English scholar, Professor T. Wemyss Fulton, *The Sovereignty of the Sea* (1911). Judge Philip C. Jessup, the eminent scholar and jurist called by the defendant States as a witness, in his treatise *The Law of Territorial Waters and Maritime Jurisdiction* (1927) p. 10, states that Fulton's work sets forth in admirable detail the history of the early British pretensions from Anglo-Saxon days through the eighteenth century. Similar approval of Fulton's work appears in Wade's Introductory Essay to Boroughs, *The Soveraignty of the British Seas* (1633, Wade ed. 1920) p. 14, note 1; Smith, *The Law and Custom of the Sea* (3d ed. 1959) p. 57, note 1; Brownlie, *Principles of the Public International Law* (1966) p. 208, note 3; and Colombos, *The International Law of the Sea* (6th ed. 1967) p. 48, note 2. The expert testimony which I have found persuasive in the light of my own study of the documents in evidence and of the judicial decisions and public acts to which I have been referred, confirmed and supplemented by the work of Fulton and other scholars, supports the findings and conclusions which follow with respect to the older [i.e. 1200 to 1600] English tradition of sovereignty of the sea, as well as the developments in that regard in the seventeenth and eighteenth centuries.

Although according to the Roman law the sea was common and free to all, in the middle ages certain seas had become more or less effectively appropriated. This took place among the early Italian republics with respect to the Adriatic, Ligurian and Tyrrhenian Seas, and with Denmark, Norway, Sweden and Poland with respect to parts of the North and Baltic Seas. Still more extensive were the claims asserted by Spain and Portugal, which in the sixteenth century sought to divide the great oceans between them. It was those pretensions to the immense waters of the globe which gave rise to the juridical controversies involving the concepts of *mare clausum* and *mare liberum* from which the modern law of the sea arose, and which led Queen Elizabeth I in 1580 to inform

the Spanish ambassador that "the use of the sea and air is common to all; neither can any title to the ocean belong to any people or private man, forasmuch as neither nature nor regard of the public use permitteth any possession thereof."*

In seeking to appropriate their adjacent seas, maritime states were doubtless impelled by consideration of their own immediate interests. But there is also a less selfish explanation. After the breaking up of the Roman empire, pirates swarmed the sea lanes. The seas were then common in the sense of being universally open to depredation. At first associations of merchants and later maritime states began policing the neighboring seas in the exercise of a protective admiralty jurisdiction. By the thirteenth century this jurisdiction came to be regarded as a prerogative of sovereign power.

(b) *English law before 1603*

There is good reason to believe that the English claims to sovereignty of the sea originated in this way through the exercise of jurisdiction by the English admirals to keep the peace and security of the sea and to protect commerce and navigation thereon. The sovereignty thus claimed did not involve, prior to the Stuart era, the concept of property rights in the high seas, however, and it had but little international importance.† The long-continued English insis-

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* Camden, *Annales* (ed. 1635) 225 [quoted in Fulton, *The Sovereignty of the Sea* (1911) p. 107]. Bracton on the Laws and Customs of England, II Thorne ed. (1968), pp. 39-40.

† Fulton, *The Sovereignty of the Sea* (1911) p. 9. It is stated in Holdsworth, I *History of English Law* (3d ed. 1922) p. 550, that "after 1363 the Admiral's criminal jurisdiction was recognized as exclusive on the high seas. This exclusive jurisdiction could be exercised over British subjects, over the crew of a British ship whether subjects or not, and over any one in cases of piracy at common law. It could be exercised over no other persons."

tence that a foreign vessel meeting one of the king's ships should lower its sail and strike its flag, which was known as the right of the flag, and which was first demanded by ordinance of King John in 1201, seems to have been required to enable the king's officers, who were patrolling the sea in order to maintain the security of navigation, to ascertain the true nature of the foreign vessel, whether it was a peaceful trader or a pirate.* The jurisdiction of the admirals continued, under the Plantagenet and Tudor monarchs, to be exercised over English subjects and ships on the high seas and for the protection of commerce in what was frequently described as the Sea of England or the narrow sea, but there is no evidence that that sea extended far from the coast or that the jurisdiction exercised therein differed from that exercised by other maritime states in their adjacent waters. The ordinance of 1201 and the admiralty records of those early times were, however, cited by Selden and others in the Stuart period as proving that the crown had always possessed the sovereignty of the sea. But beyond the protective jurisdiction which I have described, which was doubtless exercised in the Straits of Dover and perhaps in the remainder of the English Channel at times when the coasts of France were in the possession of the English crown, there is little evidence to prove that any such claim was made by the crown prior to the accession of the Stuart kings. Moreover, there were long periods of time when nothing was heard of any English pretension to a special sovereignty of the adjacent sea. Evidence of any appropriation of the sea is lacking. No tribute was levied on foreign ships passing through the Channel or the narrow seas. Nor were the sea fisheries appropriated in those days, the people of all nations being at liberty to fish on the English coast. Bracton and other writers of this early period made no claim of such an exclusive right.†

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* Fulton, *The Sovereignty of the Sea* (1911) p. 7.

† Fulton, *The Sovereignty of the Sea* (1911) pp. 65-66.

An exception to the freedom of fishing was the claim of the crown to certain large fish, including whales, taken in the adjacent seas, which were denominated royal fish. These were claimed by the crown under its prerogative. There is also evidence that the crown early claimed under its prerogative the right to wreck, treasure trove, flotsam, jetsam and lagan, and to derelict or emerged lands. But these crown prerogatives were not based in pre-Stuart times on any claim to the ownership of the seabed. Until the publication in 1569 of a treatise by Thomas Digges,* the latter claim appears never to have been suggested in any contemporary legal literature. Digges' purpose was to establish the right of the crown to the foreshore and to derelict or newly emerged lands. And although he suggested that the crown was entitled to such lands because of its ownership, which he assumed, of the seabed, he also indicated that the crown owned such lands when they arose by virtue of its prerogative right to appropriate ownerless property. I find the latter to have been the prevailing doctrine and it was also the basis for the crown's prerogative right to wreck, treasure trove, flotsam, jetsam and lagan. The crown's prerogative right to royal fish was also based upon its right to ownerless property, not on any concept of territorial jurisdiction. I am unable to find that in the older legal tradition of the pre-Stuart period it was thought that the prerogative of the crown or its sovereignty over the adjacent seas involved any property right to the seabed or to its resources prior to their actual appropriation as ownerless property.

(c) *English law during the Stuart period (1603-1688)*

Upon his accession in 1603 James I, who was king of Scotland, brought with him the Scottish policy which

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* The treatise is set out in Moore, *A History of the Foreshore and the Law Relating Thereto* (1888) pp. 185 et seq. [Me. et al. Ex. 203].

aimed at the monopolization of the fisheries.* In support of this policy there arose the political concept of the "British Seas" and James revived the fading claims of the crown to sovereignty over those seas.† James caused the bays along the English coasts, called the "King's Chambers", to be delimited. These were neutral areas within which hostile acts of belligerents were prohibited. And he laid claim to the exclusive right to the fisheries along the English, Scottish and Irish coasts.‡ This claim involved especially the rich herring fisheries of the North Sea off the east coasts of England and Scotland. These fisheries had long been exploited by the Dutch and the latter resisted the English claims. Between 1652 and 1674 three wars were fought between the English and Dutch, in which the right of fishing was one of the issues involved. The last of these wars ended in 1674 and left the Dutch with access to the fisheries in controversy without further hindrance from England.

During the reign of Charles I (1625-1649) the claims of the English crown to the sovereignty of the seas reached their most extravagant proportions. Charles claimed absolute sovereignty, to the exclusion of all foreign fleets

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* This claim to exclusive fishing rights was in direct opposition to the policy which had prevailed in the older English tradition of freedom for all nations to fish on the English coasts. Fulton, *The Sovereignty of the Sea* (1911) p. 57.

† Smith, *The Law and Custom of the Sea* (3d ed. 1959) p. 59; Brownlie, *Principles of the Public International Law* (1966) p. 208.

‡ This claim was made in the proclamation of James I issued May 6, 1609 which gave notice that no person who was not a British subject would be permitted after July, 1609 to fish upon "any of our Coasts and Seas of Great Britaine, Ireland, and the rest of the Isles adjacent" without having first obtained a royal license to do so [Me. et al. Ex. 221]. This requirement of a license for aliens to fish in the British Seas was renewed by proclamation of Charles I issued May 10, 1636 [Me. et al. Ex. 222].

and men of war, over the high seas clear across to the coasts of the continent. He asserted that these seas were under his protection as Lord of the Seas and all foreign vessels meeting one of the king's ships in his seas were to accord it the right of the flag. These claims were being made in a period of greatly expanding commercial enterprise. The European powers, especially the Dutch, were pushing into every sea for the sake of traffic and gain. The Dutch legal scholar, Hugo Grotius, had written his great work, *Mare Liberum*, in 1609 defending the concept of the freedom of the sea. Charles obviously needed legal support for his far-reaching claims. In 1618 the eminent English scholar, John Selden, had written *Mare Clausum*, a reply to *Mare Liberum*, and a defense of the claims of the English crown to sovereignty of the seas. The work remained unpublished until 1635. In that year, at the request of Charles I, Selden recast, enlarged and published his treatise. It was a work of immense scholarship and although, as later scholars have shown, it was based to a considerable extent on dubious readings of the history and documents of pre-Stuart England, it became perhaps the most authoritative and frequently-cited work on the subject during the remainder of the Stuart era.

Charles I sought to enforce by naval power sovereign jurisdiction over the wider seas which he claimed, using the famous "ship money fleets" for the purpose. During this period the courts of admiralty continued to exercise jurisdiction over English ships and English subjects anywhere on the high seas. In addition to the prevention of piracy and the protection of British subjects and property, jurisdiction was also exercised to exclude unlicensed foreign fisherman from the English seas, to enforce other measures regulating the fisheries and to deal with the failure of foreign vessels to accord the right of the flag to the king's ships. The defendant States assert that this jurisdiction was territorial in nature. I do not find any evidence, however, that the admiralty courts claimed

jurisdiction to try all crimes committed on the English seas such, for example, as the murder of one foreigner by another on board a foreign vessel. Thus their jurisdiction was not territorial in the sense in which the common law courts exercised territorial jurisdiction on land. Moreover, it appears that in the seventeenth century the common law courts were attempting to impose limitations upon the traditional jurisdiction of the admiralty courts. Much of the legal writing of this period was, therefore, in the nature of argument in defense of that jurisdiction. In the case of *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, the English Court for Crown Cases Reserved decided in 1876 that the English courts of admiralty did not have territorial jurisdiction to try a foreigner for a crime committed on a foreign ship on the high seas even though the ship at the time the crime was committed was within what had then become recognized as the three-mile belt of territorial sea. Lord Chief Justice Cockburn in his scholarly opinion in that case demonstrated that the courts of admiralty had never up to that time had such jurisdiction.* I am clear that the evidence offered by the defendant States is not sufficient to rebut the correctness of this decision. I conclude that the jurisdiction of the English courts of admiralty in the seventeenth and eighteenth centuries was not based upon a territorial concept.

In the seventeenth and eighteenth centuries the crown continued to exact the right of the flag from foreign vessels passing the king's ships in the adjacent English seas. This was, of course, in a certain sense an exercise of sovereign power in those seas. But in the treaty

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* In doing so he analyzed [1876-77 L.R. 2 Exch. Div. at pp. 163-167] the eight early cases cited by Hale in 2 *Pleas of the Crown* (1778 ed.) pp. 12-13 [Me. et al. Ex. 467] and demonstrated that they did not support Hale's statement, upon which the defendant States rely, that "the king's bench had usually cognizance of felonies and treasons done upon the narrow seas, tho out of the bodies of counties."

of 1674, which ended the third Dutch war, it was agreed that while the Dutch were to continue to accord the right of the flag it was to be merely as a ceremony of honor and a testimony of respect to the English crown. Thus as time wore on this practice lost its original importance and became merely a matter of form and it was wholly abandoned after the battle of Trafalgar in 1805. At bottom it was based on naval power and not, I believe, upon any claim of the right of ownership of the sea.

The right of the crown to emerged or derelict lands, wreck, treasure trove, flotsam, jetsam and lagan continued to be asserted in the seventeenth and eighteenth centuries. While emerged or derelict lands were still claimed by the crown under the prerogative as ownerless property, under the Stuart kings the claims came more and more to be based also upon the crown's asserted ownership of the seabed of the seas over which it claimed dominion. The defendant States cite a number of English cases and treatises of the period which take this view and which tend to support their contentions that in the seventeenth century it was generally assumed to be established English law that the crown owned the seabed and subsoil of the English seas and the resources thereof. Perhaps the most important of these is John Selden's *Mare Clausum* (published in 1635) to which I have already referred, which was written, in part at least, to justify the claim of the crown to the fisheries of the British seas. In that work Selden was responding to the theory of the freedom of the seas espoused by Grotius in his *Mare Liberum* (1609), and he took the view that the sovereignty of the crown over the English seas involved its ownership of their seabed and the sedentary fisheries, i.e., oysters, pearls, coral and the mineral resources thereof. These rights of ownership he referred to, in conventional terminology, as the crown's royalties or regalia.

Selden's *Mare Clausum* was followed, *circa* 1667, by Sir Matthew Hale's treatise *De Jure Maris* which along

with *Mare Clausum* was one of the most frequently cited works on the English law of the sea of the period of English history with which we are concerned. *Mare Clausum* and *De Jure Maris* were undoubtedly accepted as authoritative by generations of English judges and lawyers and were continually relied upon, at least during the seventeenth century, in support of proclamations, judicial decisions, legal opinions and other public documents dealing with the subject. I think it is correct to say, however, that most of these were concerned with the fisheries, the jurisdiction of the admiralty courts and the right of the flag, none of which directly involved ownership of or rights in the seabed. But there were also some cases involving emerging or relicted lands or newly arisen islands, which did directly involve land which had formerly been in the bed of the sea.

In *De Jure Maris* Hale stated [Hargrave, 1 Law Tracts, Me. et al. Ex. 194, p. 10]:

> "The part of the sea which lies not within the body of a county, is called the main sea or ocean.
>
> "The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the king of England, whether it lie within the body of any county or not.
>
> "This is abundantly proved by that learned treatise of Master Selden called *Mare Clausum;* and therefore I shall say nothing therein, but refer the reader thither.
>
> "In this sea the king of England hath a double right, viz. a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. The latter is that which I shall meddle with."

Hale goes on to say [pp. 11, 12, 14] that the king's right of propriety or ownership in the sea and soil thereof is evidenced principally by two things, the one his right of

fishing in the sea and the other his right to the foreshore and to the increase of land from the sea by alluvion, by reliction and by the arising of islands. The king's right to these increases of land from the sea Hale based upon the fact that the soil of the sea from which they arose belonged to the crown as part of its waste or demesne. I think, therefore, that it must be concluded that by the accepted English law of the seventeenth century the prerogative rights of the crown extended to the ownership of the bed of the narrow seas adjacent to the coasts of Great Britain and Ireland. These rights were based upon the claim that the narrow seas were under the dominion of the British crown and not, as the defendant States urge, upon the theory that they were within the realm of England. For the realm of England was limited to the area within the bodies of the English counties to which the common law was applicable and did not extend beyond low-water mark into the sea, the area with which the admiralty courts dealt.*

The prerogative right to the seabed was limited to those portions of the narrow seas of which the crown was in effective occupation through its naval power. For as Hale goes on to point out [pp. 31-32]:

> "The king of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the king hath that propriety in the sea: but a subject hath not nor indeed cannot have that property in the sea, through a whole tract of it, that the king hath; because without a regular power he cannot possibly possess it. . . .

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* Finch, *Law, or, a Discourse Thereof*, 1613, (Pickering ed. 1759) pp. 77-78; *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, 197-198.

> "The civilians tell us truly, *nihil praeseribitur nisi quod possidetur*. The king may prescribe the propriety of the narrow seas, because he may possess them by his navies and power. A subject cannot. But a subject may possess a navigable river, or creek or arm of the sea; because these may lie within the extent of his possession and acquest."

In thus limiting the king's prerogative to areas of the sea which he has possessed by his navies and power, Hale was following Selden who in his treatise *Mare Clausum*, entitled in translation *Of the Dominion, or, Ownership of the Sea* [Nedham translation, 1652, Me. et al. Ex. 204, p. 188] says:

> "It is true indeed which an eminent man saith; a *That the Sea hath been enjoyed by Occupation, not for this reason onely, becaus men had so enjoied the Land, nor is the Act or intent of the minde sufficient thereto; but that there is a necessitie of som external Act, from whence this Occupation may bee understood.* Therefore Arguments are not to bee derived altogether from a bare Occupation or Dominion of Countries, whose Shores are washed by the Sea: But from such a private or peculiar use or enjoiment of the Sea, as consist's in a setting forth Ships to Sea, either to defend or make good the Dominion; in prescribing Rules of Navigation to such as pass through it; in receiving such Profits and Commodities as are peculiar to every kinde of Sea-Dominion whatsoever; and, which is the principal, either in admitting or excluding others at pleasure.
>
> "a Hugo Grotius, de Jure Belli ac Pacis, lib. 2.c.3.§II."

In this respect both were in accord with what appears to have been an accepted principle of international law. The English scholar Professor C. H. M. Waldock well states

that principle in *The Legal Basis of Claims to the Continental Shelf*, 36 Grotius Society (1951) 115, 118, as follows:

> "The important point which emerges from the writings of the jurists is that, despite variations in doctrine, they were at one in not recognising any possibility of a legal title to the sea-bed or subsoil under the high seas being vested in a coastal State apart from effective occupation. The same is true of the small amount of state practice which existed in regard to submarine rights. There were a number of specific claims to exclusive rights to particular resources of the sea-bed in limited areas which were based on long enjoyment or at least on actual exploitation. The best known were various pearl, oyster and sponge fisheries. But these exclusive rights to resources on the sea-bed, when recognised as valid in law, were held to belong to the claimant States by reason of their actual enjoyment (generally from time immemorial) in particular areas and under a particular claim to exclusive jurisdiction. Similarly, in a few cases mine-shafts sunk ashore appear to have been driven outwards through the subsoil to points beyond the limit of territorial waters. These shafts were commonly said to constitute an effective occupation of the particular areas mined but no more. It is true that such claims to resources of the sea-bed or subsoil were made only by coastal States but they were justified as acts of occupation, not as the natural rights of coastal States. General or natural rights to adjacent extra-territorial resources were neither recognised nor claimed."

To the same effect are Westlake, I *International Law* (1904) pp. 186-187, and Oppenheim, I *International Law* (8th ed. Lauterpacht 1955) pp. 628-631. If the law of England on this subject were less clear than it appears to

me to be, I think that the principles of international law prevailing at the time, which Waldock describes, could properly serve to clarify it. For the courts refer to and apply settled principles of international law to supplement and support the local law when the latter is uncertain or incomplete.* It would thus appear that it was solely the exercise of British naval power which supported the crown's claim in the seventeenth century to sovereignty and prerogative rights in the narrow seas and their seabed adjacent to the British coasts.† It does not appear, however, that even in the heyday of the Stuart kings' assertion of crown sovereignty over the English seas the crown ever claimed the right, commonly exercised by maritime powers claiming complete sovereignty over their adjacent seas, of excluding peaceful foreign vessels from the English seas or of levying tribute or taxes upon those permitted to pass through them. The British failure to exercise this right of a sovereign in exclusive occupation of its adjacent sea, which, as we have seen, Selden had stated to be the principal indication that the sovereign was actually in occupation of the sea, seems to me to be strong evidence that even in the Stuart days of extravagant claims the right which the crown claimed to the sovereignty of the English seas was much less than complete and exclusive dominion and ownership. Indeed when the unrestrained rhetoric of that period is discounted and

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* *Jones v. United States*, 1890, 137 U.S. 202, 212; *Fong Yue Ting v. United States*, 1893, 149 U.S. 698, 707-711. And see *The Paquete Habana*, 1900, 175 U.S. 677, 700.

† Acceptance of the idea that the occupation of the sea by naval power could support a royal claim to ownership of the seabed was to be of short duration, however. Within a year after the end of the Stuart dynasty its demise was presaged by Sir Philip Medows, who in his *Observations Concerning the Dominion and Sovereignty of the Seas* (1689) [Me. et al. Ex. 202, p. 9] said: "To ride actual Master at Sea with a well Equipp'd Fleet, or to have such a Plenty of Naval Stores in constant readiness, as shall be sufficient to answer all Occasions, is not the Dominion of the Sea; This is Power, not Property, . . ."

the actual practice alone is considered, the rights sought to be exercised by the crown were almost wholly limited to the control of the fisheries, the admiralty jurisdiction and the enforcement of the right of the flag. The defendant States have cited many cases decided during that period involving the ownership of the crown of the foreshore, the beds of English rivers, relicted lands and newly arisen islands, in which the courts assumed crown ownership of the seabed from which the relicted lands or islands had arisen as a basis of decision, citing Selden and Hale. But aside from some underseas mining from the shore and some sedentary fishing for shellfish, pearls and certain minerals I have been referred to no instances in which the seabed itself in the British seas beyond low-water mark was directly involved in litigation.*

It was only during the Stuart era that crown possession of exclusive fishery rights in the sea was asserted as a basis for sustaining its claim to ownership of the sea and seabed. As we have seen, Hale made use of that argument. But the exclusive right to take swimming fish from the sea had no peculiar or necessary relationship to ownership of the seabed, contrary to the case of sedentary fisheries. Indeed while claims to wide expanses of seabed began with the Stuart kings and ended after their departure, intense interest in ocean fisheries goes back into antiquity and continues to the present day. For what is involved is a food resource of great importance to the maritime states and it is the preservation and exploitation of this resource with which they were, and still are, primarily concerned.

It will be observed that Hale in *De Jure Maris* restricted the jurisdiction and ownership of the king to the narrow sea adjoining the coast of England. The actual

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* Thus it appears that even in Stuart times the situations in which claims of the crown to sovereignty of the sea were made normally involved only jurisdiction of the surface of the sea or control of the fisheries therein and not actual ownership of the seabed.

width of the narrow sea was never defined in English law. At times it was applied to the Straits of Dover or the English Channel and very commonly in the seventeenth century to the marginal sea along the whole coast or the "British Seas". Widths of 100 miles and 60 miles were sometimes suggested but never consistently followed or applied. By leaving the limits vague and ambiguous British claims to maritime sovereignty could be put forward and used as a political instrument when the navy was strong and occasion offered, and when the navy was weak the claims might fall into the background without affecting national honor.*

(d) *English law after 1688*

Following the end of the Stuart dynasty in 1688 and in the course of the eighteenth century the claim of the crown to the sovereignty of the British seas became more and more an anachronism and it was allowed to die out from practical affairs, surviving, as Fulton says, in *The Sovereignty of the Sea* (1911) pp. 21, 538, "only in the pages of historians, naval writers, and pamphleteers" and "without apparently leaving a single juridical or international right behind it." Grotius' *Mare Liberum* had finally prevailed over Selden's *Mare Clausum*. As Jessup states in *The Law of Territorial Waters and Maritime Jurisdiction* (1927) p. 4: "Selden's own nation repudiated his stand during the eighteenth century. . ."†

Brownlie, in his *Principles of the Public International Law* (1966) pp. 208-209, describes the transition as follows:

> ". . .The seventeenth century marked the hey-day of the *mare clausum* with claims by England, Den-

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* Fulton, *The Sovereignty of the Sea* (1911) pp. 15, 18-21.

† And see Pitman B. Potter, *The Freedom of the Seas in History, Law and Politics* (1924) pp. 89-91.

mark, Spain, Portugal, Genoa, Tuscany, the Papacy, Turkey and Venice.

"In the eighteenth century the position changed completely. Dutch policies had favoured freedom of navigation and fishing in the previous century, and the great publicist Grotius had written against the Portuguese monopoly of navigation and commerce in the East Indies. After the accession of William of Orange to the English throne in 1689 English disputes with Holland over fisheries ceased. However, the sovereignty of the sea was still asserted against France, and in general the formal requirement of the salute to the flag was maintained. By the late eighteenth century the claim to sovereignty was obsolete and the requirement of the flag ceremony was ended in 1805. After 1691 extensive Danish claims were reduced by stages to narrow fixed limits. By the late eighteenth century the cannon-shot rule predominated, and claims to large areas of sea faded away."

As Elihu Root, one of the most eminent of American statesmen, put it in his argument in the North Atlantic Fisheries arbitration, XI *Proceedings*, North Atlantic Fisheries Arbitration, p. 2006 [quoted in Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927) p. 5]:

"These vague and unfounded claims [of the 18th, 17th, and earlier centuries] disappeared entirely, and there was nothing of them left. . . . The sea became, in general, as free internationally as it was under the Roman law. But the new principle of freedom, when it approached the shore, met with another principle, the principle of protection, not a residuum of the old claim, but a new independent basis and reason for modification, near the shore, of the principle of freedom. The sovereign of the land washed by the sea asserted a new right to protect his subjects and

> citizens against attack, against invasion, against interference and injury, to protect them against attack threatening their peace, to protect their revenues, to protect their health, to protect their industries. This is the basis and the sole basis on which is established the territorial zone that is recognized in the international law of today. Warships may not pass without consent into this zone, because they threaten. Merchant-ships may pass and repass because they do not threaten."

Thus during the eighteenth century there developed a new principle of protection to be exercised in the marginal waters of a state to the extent that they could be controlled from the shore. This new and more realistic principle that jurisdiction could be claimed only within the belt of marginal sea which was subject to continuous domination from the land replaced the former unrealistic and extravagant idea that the exercise of naval power was sufficient to possess the sea. Within this belt of what has now come to be known as the territorial sea the coastal state was recognized as entitled to enforce its neutrality and exercise other rights. In the case of Great Britain this was a new right of modern origin derived from international law and was not a residuum of the former more extensive claim to sovereignty and ownership of the narrow or English seas. Viscount Haldane, the Lord Chancellor, speaking for the British Privy Council in *Attorney General for British Columbia v. Attorney General for Canada*, [1914] L.R. Appeal Cases 153, said as to this [p. 174]:

> "They desire, however, to point out that the three-mile limit is something very different from the 'narrow seas' limit discussed by the older authorities, such as Selden and Hale, a principle which may safely be said to be now obsolete. The doctrine of the zone comprised in the former limit owes its origin to com-

paratively modern authorities on public international law."

The necessary conclusion is that in the eighteenth century the former claim of the crown to ownership of the seabed of the narrow or English seas went the way of the claim to the sovereignty of the sea upon which it was based. This was forcefully pointed out by Lord Chief Justice Cockburn in *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, when he said [p. 196]:

> "But to what, after all, do these ancient authorities amount? Of what avail are they towards establishing that the soil in the three-mile zone is part of the territorial domain of the Crown? These assertions of sovereignty were manifestly based on the doctrine that the narrow seas are part of the realm of England. But that doctrine is now exploded. Who at this day would venture to affirm that the sovereignty thus asserted in those times now exists? What English lawyer is there who would not shrink from maintaining—what foreign jurist who would not deny—what foreign government which would not repel such a pretension? I listened carefully to see whether any such assertion would be made; but none was made. No one has gone the length of suggesting, much less of openly asserting, that the jurisdiction still exists. It seems to me to follow that when the sovereignty and jurisdiction from which the property in the soil of the sea was inferred is gone, the territorial property which was suggested to be consequent upon it must necessarily go with it."

Thereafter, and until the recognition in the nineteenth and early twentieth centuries of the new concept of the full sovereignty of the coastal nation in its territorial sea, claims to the seabed were made only in cases where there had been actual, and usually long-continued, possession and exploitation, such, for example, as in the case of the

sedentary pearl fisheries of the Gulf of Mannar off the coast of Ceylon and of the Persian Gulf off Bahrein.

It is true, as the defendant States point out, that during the seventeenth century and before the new concept of the territorial sea had come to be accepted, England by a number of Acts of Parliament exercised authority over and regulated in various ways fishing in the seas adjacent to the English coast as well as prevented smuggling and enforced neutrality in those waters. However, the latter two activities were carried on in the exercise of a protective jurisdiction which did not involve the, by then, abandoned claim of the crown to the absolute dominion of the sea and seabed. And the same may be said of the fisheries legislation which related to a marine resource of England with which, as we have seen, the crown had been concerned for many centuries before the Stuart kings made their extravagant claims to sovereignty of the sea and ownership of the seabed.

The new principle had its origin primarily in the necessity for maritime states to protect themselves from the operations of belligerents by defining a belt of marginal sea along their coasts in which they would enforce neutrality. Various principles of delimitation were suggested. However, the rule now generally accepted was first propounded in 1703 by a Dutch jurist, Cornelius van Bynkershoek, who in his *De Dominio Maris Dissertatio* and later works advanced the principle that the dominion of a state extended over the adjacent sea as far, and only as far, as it was able to command and control it from the land. This, he suggested, should be as far as projectiles could be fired by cannon from the shore, so that exclusive possession might be taken of the part so commanded. van Bynkershoek's phrasing of this principle in his *Quaestiones Juris Publici* (1737) "*terrae dominium finitur ubi finitur armorum vis*",* has been quoted by a legion of

* "The dominion of the land terminates where the power of arms ends."

later writers. His doctrine was attractive, conformed with the general practice that ships coming in from the sea saluted the coastal forts when within cannon range, and eventually was widely accepted not merely for purposes of neutrality but also ultimately as defining the extent of adjacent sea over which a maritime state might exert its full sovereignty as its territorial sea.

Various suggestions were made by jurists during the eighteenth century as to the distance from shore which should be regarded as the range of cannon shot for the purpose of defining the width of the territorial sea. Among these was the suggestion first advanced by Galiani in 1782,* and which at the time was fairly accurate, that three geographical miles or one marine league was the range of a cannon shot and should, therefore, be adopted as the limit of the territorial sea. It was this three-mile formulation which, largely under the leadership of the United States, was adopted early in the nineteenth century by both Great Britain† and the United States to define

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* Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927) p. 6.

† The first recognition by an English court of three miles as the limit of the marginal neutrality belt was by the eminent admiralty judge, Sir William Scott, afterward Lord Stowell, speaking for the High Court of Admiralty in 1800 in *The Twee Gebroeders*, 3 C. Rob. 162, 165 Eng. Repr. 422. In *The "Anna"*, 1805, 5 C. Rob. 373, 165 Eng. Repr. 809, a case in the same court involving the legality of the seizure of an American ship by an English privateer off the delta of the Mississippi River, Sir William Scott said [pp. 385b-385c]

> "The capture was made, it seems, at the mouth of the River Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is '*terrae dominium finitur, ubi finitur armorum vis*,' and since the introduction of fire-arms, that distance has usually been recognised to be about three miles from shore."

See also Smith, *The Law and Custom of the Sea* (3d ed. 1959) p. 24.

more precisely the cannon-shot rule as to the limits of the territorial sea. Although soon outmoded as the actual range of artillery it proved serviceable and has been widely adopted by other maritime nations.

I find that some time before 1776 the earlier English pretensions to sovereignty over the English seas and with them the claim of the crown to the seabed of those seas had been abandoned and were beginning to be replaced by the new concept of a marginal band of sea within cannon shot of the shore, a distance which was later to be equated with three miles, in which the crown could enforce neutrality, control fishing and exercise other sovereign powers. I find no evidence, however, that the idea of sovereignty over the marginal belt of sea, in a territorial sense, was accepted in either English or American law until well into the nineteenth century. Indeed, in *The Queen v. Keyn*, [1876-77] L. R. 2 Exch. Div. 63, the English Court for Crown Cases Reserved held that even as late as the date of that decision the English realm did not include the marginal sea and England did not claim territorial jurisdiction for its courts in that sea. It would appear that the Territorial Waters Jurisdiction Act, 1878, 41 & 42 Vict. c. 73, § 7, which claimed the open sea within one league of the coast as territorial waters, and which was passed shortly after the decision in *The Queen v. Keyn*, was intended to assert jurisdiction over the area which the court held had not theretofore been claimed, not to repudiate or overrule the decision as the defendant States suggest.* The legal posture was quite similar to that involved in the *California* decision of this Court and the subsequently enacted Submerged Lands and Outer Continental Shelf Lands Acts. I find that this Court stated

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* In *Harris v. Owners of the Steamship Franconia*, [1876-77] L.R. 2 Com. Pl. Div. 173, three judges of the Common Pleas Division of the High Court, all of whom had dissented in *The Queen v. Keyn*, held themselves bound to apply the rule laid down by the

the facts with precise accuracy when in the *California* case, 1947, 332 U.S. 19, it said [p. 32]:

> "At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders . . . But when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion."

I conclude that when in 1776 the American colonies achieved independence and when in 1783 the Treaty of Paris was concluded, neither the British crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast, except for those limited areas, if any, which they had actually occupied.

3. The American Colonial Charters

It is the contention of the defendant States that the charters granted by the crown for the American colonies created a territorial sea 100 miles in breadth and conveyed to the companies or individual proprietors to whom the colonies were granted sovereignty and dominion over that sea, which included ownership of the seabed and its resources. The language of the charters certainly did not do so expressly. In the case of 10 of the colonies with which we are here concerned the colonial boundaries were vari-

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majority in that case, the Chief Justice of the Division, Lord Coleridge, saying [p. 177]:

> ". . . It seems to me to be quite plain that the decision in *Reg. v. Keyn* . . . is binding upon all the Courts. The ratio decidendi of that judgment is, that, for the purpose of jurisdiction (except where under special circumstances and in special Acts parliament has thought fit to extend it), the territory of England and the sovereignty of the Queen stops at low-water mark."

ously described as "along the Sea Coasts", Maine, 1639 [Me. et al. Ex. 3]; "from Sea to Sea", New England, 1620 [Me. et al. Ex 11]; "along ye Sea coaste", New Hampshire, 1629 [Me. et al. Ex. 13]; "from the Atlantick and Westerne Sea and Ocean on the East Parte, to the South Sea on the West Parte", Massachusetts Bay, 1629 [Me. et al. Ex. 24]; "and bounded on the south by the ocean", Rhode Island, 1663 [Me. et al. Ex. 156]; "and bounded on the east part by the main sea", New Jersey, 1664 [Me. et al. Ex. 69]; "unto the main Ocean on the East", Maryland, 1632 [Me. et al. Ex. 141]; "all along the said Coast", Virginia, first charter, 1606 [Me. et al. Ex. 41]; "all along the Sea Coast . . . up into the Land throughout from Sea to Sea", Virginia, second charter, 1609 [Me. et al. Ex. 42]; "to the Ocean upon the east side", Carolina, 1629 [Me. et al. Ex. 271]; "all along the sea coast", Georgia, 1732 [Me. et al. Ex. 274]. In the case of New York the patent from King Charles II to the Duke of York in 1664 did not mention the ocean boundary but specifically granted Long Island and other islands and the land from the west side of the Connecticut River to the east side of the Delaware Bay [Me. et al. Ex. 67]. A boundary along the Atlantic Ocean was thus clearly implied. The grant of Delaware in 1682 was described as lying "upon Delaware River and Bay" south to Cape Henlopen, therein called Cape Lopen, which was erroneously assumed to be at the mouth of the Delaware Bay [Me. et al. Ex. 102]. Thus no grant of land fronting the sea was intended.

It appears that when the crown intended to grant territorial ownership of portions of the sea and seabed it used language which was clear and appropriate for that purpose. Thus the Newfoundland charter of 1610 specifically granted the "seas and islands lying within ten leagues of any part of the sea coast" [Me. et al. Ex. 179], and the 1621 grant of Nova Scotia conveyed islands or seas lying near or within six leagues from any part of the mainland on the west, north and east sides and to the south all the seas

and islands within 40 leagues of the shore. The boundaries created by the 1662 charter of Nova Scotia extended "30 leagues into the sea" [Me. et al. Ex. 240, p. 101]. And when the crown in its patent for Delaware in 1682 desired to grant to the Duke of York that portion of the River Delaware and its riverbed lying within 12 miles of the town of Newcastle it conveyed in specific terms "the said River and Soyle thereof" within those limits [Me. et al. Ex. 102].

The defendant States argue, however, that the language of the charters, construed in the light of contemporary legal usage, was sufficient to accomplish these ends. The language upon which the defendant States rely and which appeared in one form of words or another in most of the charters was the grant of all jurisdiction, franchises and royalties by sea and land. I agree, however, with the United States that a grant in such general terms is not an indication that the crown claimed and intended to grant sovereignty and ownership of the adjacent seas, let alone a seabelt 100 miles wide. Jurisdiction, franchises and royalties by sea, as used in the seventeenth and early eighteenth centuries, did not necessarily involve any claim to ownership or sovereignty of the adjacent seas and appear, on the contrary, to have comprehended rights which were independent of such a claim. Certainly jurisdiction in the protective sense did not involve any such claim. I believe this is also true with respect to franchises and royalties. The term royalties, as then used, referred to the prerogative rights of the crown. These had been authoritatively described in the document entitled *De Prerogativa Regis** and included in this regard such things as wreck and royal fish. I do not understand that the sovereignty and ownership of the adjacent seas, seabed and subsoil were included, however. Indeed, as we have seen, under the older English legal tradition the concept of crown ownership of the seabed was unknown and, as I

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* 17 Edw. II., Stat. 1, c. 11 [Me. et al. Ex. 729, p. 227].

have found, was first authoritatively asserted in the works of Selden and Hale in the middle years of the seventeenth century after most of the colonial charters had been granted. Moreover, it is very doubtful whether such a general grant of royalties would have been sufficient to pass a specific prerogative right not itself enumerated or in some way identified. Thus it was held in an opinion by the Attorney General and Solicitor General of England to the Commissioners of Trade and Plantations in 1723, Chalmers, *Opinions of Eminent Lawyers* (1st Am. ed. 1858) pp. 141-142, that the charters of New Jersey did not grant royal mines even though the granting clauses included the general terms "mines", "minerals" and "royalties". And to the same effect with respect to a royal grant of franchises, without more, is the opinion of the court in *Attorney-General v. Trustees of the British Museum*, [1903] L.R. 2 Ch. Div. 598, 614.

I think that to hold that by the use of the word "royalties" in these colonial charters the crown conveyed full sovereignty and dominion over the adjacent seas and ownership of the seabed and its resources is to load that single word with far more cargo than it can be asked to carry. Moreover, if the charters did actually grant ownership of the adjacent sea it would not have been necessary for them expressly to convey harbors, havens, ports, bays, inlets and creeks of the sea, as well as fisheries, as was done in one form of words or another in most of them.

The defendant States point to the fact that in some cases the charters also granted islands off the coast of the colony. They contend that a grant of islands off the coast was regarded implicitly either as a conveyance of the intervening seas or as a recognition that the intervening seas likewise passed as a necessary appurtenance to the mainland. I cannot agree. On the contrary, Bartolus, upon whom they rely as having enunciated in the fourteenth century the doctrine that a coastal state was entitled to islands within 100 miles of the coast, stated that while the

coastal state might exercise exclusive protective jurisdiction over the intervening seas, it had no right of sovereignty over those seas, its property right involving only the islands, not the seas.* I find nothing in the English writers of the seventeenth and earlier centuries to the contrary. Moreover, this contention loses its force when we consider that the defendant States themselves have not urged in this case that the third Virginia charter, granted in 1612, which conveyed islands within 300 leagues of the Virginia coast, thereby conferred upon the colony ownership of the sea and seabed seaward to that distance. [Me. et al. Ex. 43]. In the second *Louisiana* case, 1960, 363 U.S. 1, 67-70, 81, this Court held that the statehood-enabling acts for Louisiana and Mississippi which included within those prospective States all islands within three and six leagues, respectively, of their shores, did not embrace within their territory all the waters within that distance as well. This case would appear to be controlling on this point.

The defendant States further contend that the colonial charters should in any event be construed as creating territorial seas and granting sovereignty, dominion and seabed ownership of those seas. They urge this conclusion in the light of the contemporaneous claims of the British crown in the English seas and of the fact that the persons who were involved in asserting and defending those claims were largely the same persons as those responsible for chartering and establishing the American colonies. I cannot agree with this conclusion. The claim of the crown in the seventeenth century to sovereignty of the English seas was, as we have seen, quite different from the modern concept of sovereignty of the three-mile belt of territorial sea and was in no sense the precursor of the latter. It involved, at bottom, protection and security, matters of

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* Fenn, *The Origin of the Right of Fishery in Territorial Waters* (1926) pp. 101-102.

vital importance to the insular English nation faced, as it was, on at least two sides by nearby nations which were frequently hostile. The English seas had no defined or established limits and were expanded and contracted as the needs of the times changed and as English naval power, which enforced the crown's claimed sovereignty, was greater or less.

The situation off the coasts of the defendant States in colonial times was quite different. Aside from the fisheries off the coasts of Newfoundland and Nova Scotia, which were very rich and had long been exploited by the French, the Spanish and the Portuguese, as well as by the English, England showed little interest in the North American coastal seas. Compared to those fisheries the fisheries in in the areas southwest of Nova Scotia and Newfoundland were relatively unimportant and in the more southern areas insignificant. Hale pointed out in *De Jure Maris* that occupation by the king's navies and power was necessary for the acquisition of sovereignty and dominion over the adjacent seas and this was the then prevailing idea. The narrow seas adjacent to the coasts of the British Isles had been thus occupied by British naval power for centuries. But very little English naval occupation of the seas adjacent to the Atlantic coast of the English colonies in America had taken place except with respect to the rich fishing areas off the coasts of Newfoundland and Nova Scotia. And it does not appear that there had been any significant occupation of the seabed. The symbolic occupation of the adjacent land areas by English explorers was not enough for that purpose under English law, as Selden pointed out in the portion of his treatise *Mare Clausum* (Nedham's translation), which has already been quoted.

While the colonial charters may well have conferred a protective admiralty jurisdiction over the sea adjacent to the colonies, I am satisfied that they did not convey territorial property rights in that sea or its seabed resources. I am supported in this conclusion by decisions of

the highest courts of two members of the British Commonwealth, Canada and Australia. *Reference Re Ownership of Off-shore Mineral Rights of British Columbia*, [1967] Canada L.Rep. 792, 65 D.L.R. (2d) 353, involved rights to the natural resources of the seabed adjacent to the British Columbia coast which were claimed by the province on the basis of its colonial grants and charters. The Supreme Court of Canada held in that case [p. 373] that the territory granted to the province ended at low-water mark and that it had not acquired and did not have ownership or property in the territorial sea but that these were vested in the Dominion government. In *Bonser v. La Macchia*, 1969, 43 Aust. L.J. Rep. 411, the High Court of Australia had to deal with the question whether the territorial limits of the State of New South Wales extended into the waters adjacent to its coast. The court decided that the territory of the colonies, including New South Wales, ended at the low-water line. Chief Justice Barwick, who was with the majority, in his opinion said [p. 414]:

> "I think it is essential to bear in mind that when colonies were formed all that relevantly occurred was that a specified land mass was placed at the outset under governorship, and later, under the control of a legislature. The instruments setting up the colonies did not in terms include as territory and subject to colonial governorship any part of the bed of the sea or the superincumbent waters."

I am also supported in my conclusion by the decision of the English Court for Crown Cases Reserved in *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, in which the court held that the English courts of admiralty did not have the territorial jurisdiction over crimes committed by foreigners on the high seas, even on the marginal sea adjacent to the English coasts, which the common law

courts exercised within the realm. The realm, as Lord Chief Justice Cockburn pointed out in his prevailing opinion, included only the area within the bodies of the counties and ended at low-water mark on the coast.

The defendant States point out that these cases were decided long after 1776 and are, therefore, they say, irrelevant to our problem. I cannot agree. To the extent that they discuss the state of English law prior to American independence with respect to the claims of the crown to sovereignty over the marginal sea they are highly relevant. For the opinions were delivered by eminent English and Commonwealth judges upon a matter of English law. I have, therefore, given these opinions the authority and respect to which I believe them to be entitled.

The defendant States offered in evidence a number of maps made during the colonial period in which the sea off the Atlantic coast of the American colonies was designated as the British sea or the sea of the British Empire, or portions of it as the sea of Carolina, Virginia, Maryland, New York, New England or Nova Scotia. They urge that these maps are evidence of the recognition of a territorial sea off the Atlantic coast in the colonial period. I cannot agree. The evidence indicates, as I have found, that the concept of a territorial sea did not arise until after the colonial period. Certainly the concept of a sea of the British Empire extending across the ocean from the British Isles to the coasts of the American colonies, which was one of the most extravagant of the Stuart claims, did not involve a claim to territorial dominion. Nor did the designation of portions of the Atlantic Ocean by the names of the colonies the shores of which they washed involve such a claim, any more than did the names given on some of the same maps to the Gulf or Sea of Mexico, the Sea of New Spain, and the Sea of California. Being used by English cartographers these seem obviously to have been employed solely as convenient geographical names with no overtones of territorial sovereignty on the part of the Spanish colonies for

which they were named and so, I believe, were the names used on the maps to which the defendant States refer.*

If it be assumed *arguendo* that the English crown in the seventeenth century claimed sovereignty over the seas adjacent to the American colonies including the ownership of the seabed, and if it be further assumed that this sovereignty and ownership somehow passed to the colonies, the ultimate conclusion must be the same. For so long as the colonies bore allegiance to the crown of England they were subject to the English law as it developed with respect to these matters of sovereignty and ownership. And since, as I have found, the pretensions of the crown to sovereignty of the adjacent seas had been abandoned as a principle of English law before 1776, the colonies would have ceased before independence to have the rights in the adjacent sea which the crown no longer claimed.

The United States contends that assuming *arguendo* that property rights to the marginal seas and seabed were conveyed to the colonies by the original grants and charters, those rights, at least in most of the colonies, reverted to the crown when they became crown colonies before independence. However, I do not find it necessary to discuss this contention since, as will be developed later in this report, those rights, if any, would have passed in any event to the federal government either from the crown under the Peace Treaty of 1783 or from the individual states under the Constitution of 1787.

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* In his *Observations Concerning the Dominion and Sovereignty of the Seas* (1689) [Me. et al. Ex. 202, p. 9], Sir Philip Medows said:

> "Much less do such usual Expressions and Words as these, the *British* Seas, the Sea of *England*, *Our Seas*, import any legal Dominion, but only denote a Geographical Description, as *Mare Flandricum*, *Mare Normannicum*, *Mare Aremoricum*, *Mare Aquitanicum*, and a hundred others do. And nothing more usual, than for Seas to receive their Denominations from the Shoars they rowle upon, and *Our Seas* are the Seas which rowle upon our Shoars."

I need only add that in my view the evidence in the present case fully supports the finding of this Court in the *California* case, 1947, 332 U.S. 19, 32-33, that the English charters which were granted to this nation's settlers did not show a purpose to set apart an ocean belt for colonial or state ownership.

Before leaving the subject of the rights alleged to have been received by the colonies from the crown I note that the State of New York in its answer claimed that in its inception as a Dutch colony it received seabed rights from the crown of Holland. However, no evidence of the grant of any such rights was offered and there is nothing in the record to support the allegation of the State of New York in this regard.

4. The Activities of the Colonies in their Adjacent Seas during the Colonial Period.

The principal activity of the colonies in their adjacent seas related to the fisheries. While the great bulk of this activity centered in the areas of the rich fisheries off the coasts of Newfoundland and Nova Scotia, in which the New England colonists actively participated, there was a modest amount of fishing in the seas off the New England colonies themselves and fishing there and in the richer fisheries to the northeast was an important activity in those colonies. In the case of the colonies farther to the south it was minimal. There is evidence that the New England colonies at times sought to establish exclusive rights to the fisheries in both their inland waters and the waters of the sea off their respective coasts. It would appear, however, from orders of the English privy council issued in 1619 and 1620 that no exclusive grant to the colonies of jurisdiction over the fisheries had been intended by the crown. For by those orders the southern and northern colonies were empowered to fish within each other's limits for the sustentation of their people and also to have

freedom of their shores for drying nets and taking and saving fish. *Acts of the Privy Council (Colonial)* [1621] pp. 40-41 [Me. et al. Ex. 237]. Thus it appears that the ultimate control of the fisheries was retained by the crown and not granted to the colonies. Moreover, the sections of the sea involved, ownership of which might be claimed on the basis of occupation, were the areas immediately adjacent to the shore which were undoubtedly within the three-mile belt that is not in controversy in this case. The New England fishing in inland and nearby waters, as distinguished from the fishing in the rich fisheries in the high seas to the northeast, necessarily involved the use of local shore-based facilities to which to bring and cure the fish. It was for the regulation of fishing which involved these shore-based activities that much of the colonial legislation in evidence was directed. I am satisfied that the colonial legislation relating to fisheries was based on the control which the colonies exercised over their own residents or on their control of activities on or close to their shores or in inland waters. Similarly, legislation prohibiting the pollution of coastal waters and regulating local shipping was directed to the health and welfare of the colonial residents and was not based on any claim to ownership of the sea or seabed.

The defendant States also point to the whaling activities of the colonists. In the early colonial period these were confined to "drift whales", dead whales cast or driven on shore or found within a short distance from the shore and brought ashore. That part of this activity which involved the sea was well within the three-mile belt. It was only in the later colonial period that colonists began to take whales at sea. In this later activity they ranged widely over the oceans far from any area which could conceivably be regarded as under colonial jurisdiction. Likewise the colonial legislation regulating whaling appears to have dealt with the conduct by the colonists of this activity wherever it was carried on, not merely in the adjacent

seas. Whales, as has been noted, were considered royal fish. Their taking was regarded as a royal prerogative and was the subject of the colonial legislation to which I have referred. But since the legislation regulated such taking by local residents of whales wherever they were to be found, the prerogative right under which it was enacted could not have been possessed upon any theory of ownership of the coastal seas.

The only activity of the colonists directly related to the seabed was the sedentary fishery involved in the gathering of shell fish. While this took place largely in shallow protected bays and other inland waters, it is doubtless true that some of it took place in the shallow and tidal waters along the seashore. Such activity might possibly support a claim to the areas in question based on actual occupation of them. But in any event such minimal activity in the seabed was clearly within the three-mile sea belt which is not here in litigation and involved no claim whatever to the deeper waters farther offshore on the continental shelf, with which we are concerned. It certainly did not constitute basis for a claim to the ownership of the ocean and its bed for a distance of 100 miles offshore. Nor does the evidence as to derelict or reclaimed lands support such a claim. These, of course, became a part of the territory of the colony when they emerged from the sea, but there is no evidence whatever of any claim by a colony to the seabed from which they arose. Nor is there evidence that a grant of any portion of the bed of the high seas, as distinguished from land under rivers, bays and similar inland waters, was ever made by any colony. Wreck, treasure trove, flotsam, jetsam and lagan are, of course, not natural resources of the sea or seabed. The scanty evidence of colonial activity with respect to these droits of admiralty does not indicate that claims to these chattels were based on sovereignty and ownership of the seas but rather upon their being found upon or brought to land in the colony.

The defendant States urge that the exercise by the

colonies of admiralty jurisdiction was territorial in nature and was based upon the colonial sovereignty and ownership of the adjacent seas. I am not able to find that this was so. As indicated earlier in this report, the English admiralty jurisdiction was based on a protective concept, not on a territorial one. It was exercised with respect to piracy and with respect to English vessels and subjects anywhere on the high seas. Indeed, as was held in *The Queen v. Keyn*, [1876-77] L.R. 2 Exch. Div. 63, the court did not have territorial jurisdiction even in what is now the narrow three-mile belt of territorial sea. The admiralty jurisdiction granted to the colonies was certainly no more territorial than that of England and was not related to any claim of sovereignty or ownership of the adjacent seas. This is highlighted by the fact that the Maine charter of 1639 [Me. et al. Ex. 3] granted admiralty jurisdiction out to 20 leagues although it only included within the territory of the province islands within five leagues of the mainland. Even the earliest exercises of admiralty jurisdiction by the colonies were subject to the ultimate control of crown officials and review by the High Court of Admiralty in England. And after 1696 vice-admiralty courts established by the crown in each colony assumed complete admiralty jurisdiction. This jurisdiction was that of the crown, not the colonies, since these were crown courts over which the colonies had no control and they enforced English navigation laws and entertained maritime controversies as well as cases of piracy, privateering and felonies committed by English subjects on the high seas. In the eighteenth century these royal courts came to enforce the White Pine Act, the Stamp Act, the Tea Act and other English statutes. The expanded jurisdiction of the vice-admiralty courts and the fact that they sat without juries and were not responsible to the colonies were among the grievances leading to the American revolution.

My conclusion is that colonial activities do not support the claim that dominion and control of the seabed and

subsoil of the adjacent sea beyond the three-mile limit seaward for 100 miles or any lesser distance were claimed or exercised by the colonies.

5. The Effect of Independence and the Ratification of the Constitution

The defendant States urge that upon attaining independence in 1776 they individually succeeded to the maritime territorial sovereignty and dominion over the adjacent seas and seabed both of their predecessor colonies and the British crown. As hereinabove indicated, I am unable to find that the colonies had previously acquired territorial sovereignty and dominion over their adjacent seas and seabed. But if *arguendo* we assume that sovereignty and dominion over the seas and seabed off the American coast were still claimed by the crown in later colonial days, they were, I believe, retained by the crown as prerogatives of its sovereignty over the British colonies. The question remains, however, whether such crown sovereignty and dominion, if any, as then existed over the marginal sea and seabed off the Atlantic coast passed at independence and upon the conclusion of peace with Great Britain to the individual states or to the United States as a national sovereign.

I find that upon the establishment of the First Continental Congress in 1774 the United States of America emerged, first as a federation of colonies and after independence in 1776 as a federation of internally independent but united states, to which newly-formed federation the people of the several states delegated those sovereign powers associated with external sovereignty. This Court has heretofore taken such a view, holding that upon achieving independence the powers of external sovereignty which the British crown had theretofore exercised over the American colonies passed to the national government then represented by the Continental Congress and not to the several states. *United States v. Curtiss-Wright Corp.*,

1936, 299 U.S. 304. And see *Respublica v. Sweers*, Sup. Ct. Pa. 1779, 1 Dall. 41, 44; *Chisholm v. Georgia*, 1793, 2 Dall. 419, 470-471; *Penhallow v. Doane*, 1795, 3 Dall. 54, 80-81, 91. In the *Curtiss-Wright* case this Court said [pp. 316-317]:

> "During the colonial period, those [international] powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, 'the Representatives of the United States of America' declared the United [not the several] Colonies to be free and independent states, and as such to have 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.'
>
> "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency —namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. See *Penhallow v. Doane*, 3 Dall. 54, 80-81. That fact was given practical application almost at once. The treaty of peace, made on September 23, 1783, was concluded between his

> Britannic Majesty and the 'United States of America.' 8 Stat.—European Treaties—80."

The defendant States assert that the *Curtiss-Wright* case was wrongly decided upon a misconception of the historical facts and they make an elaborate argument in support of the thesis that no national government with even limited powers of external sovereignty came into existence until the Constitution was adopted, the several states being meanwhile completely independent and sovereign in the international and every other sense. There is unquestionably a great diversity of opinion on this question among historians and statesmen of the period and the evidence in the present case is sharply conflicting. But there is ample evidence to support the finding, which I make, that the Continental Congress and its successor in 1781, the Congress of the Confederation, carried on the war for independence, raising and supplying the continental army and navy, that each of them, in turn, established diplomatic relations and made treaties with foreign nations, including the treaty of peace with Great Britain, that they exercised appellate jurisdiction in admiralty, and that they exercised other sovereign powers, such as regulating the coinage and providing a general postal service. In my view, the historical facts as to the pre-Confederation period are fairly summarized by Evarts Boutell Greene in *The Foundations of American Nationality* (1922) as follows [pp. 558-559]:

> "Without a formal constitution, Congress managed to organize extensive departments for war, foreign affairs, and finance, as well as a general postal service. It even organized a court for the trial of appeals in prize cases. From this practical point of view, it can hardly be denied that the Continental Congress, with all its obvious limitations, was a *de facto* federal government, acting for a real political entity known to the outside world as the United States of America."

The Articles of Confederation which came into force in 1781 expressly delegated these and other powers to the Congress of the Confederation, and the Constitution adopted in 1787 continued them in the national government in the "more perfect union" which it was its purpose to accomplish. I conclude that there is ample support for the accuracy of the historical facts upon which this Court based its decision in the *Curtiss-Wright* case.

Among the powers acquired by the national government at independence and through the Treaty of Peace were such sovereignty and dominion, if any, over the American coastal seas and seabed as had theretofore been vested in the British sovereign. This Court decided in *Martin v. Waddell*, 1842, 16 Pet. 367, and reaffirmed in *Massachusetts v. New York*, 1926, 271 U.S. 65, that rights to the soil under navigable waters inhere in the sovereign and pass to a new sovereign upon a transfer of sovereignty. While *Martin v. Waddell* involved inland waters in New Jersey and *Massachusetts v. New York* involved waters in Lake Ontario within the boundaries of New York, the principle which they annunciate is equally applicable to the soil under the territorial sea. *United States v. Texas*, 1950, 339 U.S. 707, 717. It necessarily follows that if the British crown, prior to independence, did claim sovereignty and dominion over the sea and seabed off the Atlantic coast beyond the territorial limits of the states that sovereignty and dominion passed after independence to the national government in which the powers of external sovereignty were reposed and not to the defendant States. This result, moreover, is consonant with the doctrine of *United States v. California*, 1947, 332 U.S. 19, and the cases which followed it, that the possession of rights in the adjacent seas and seabed is an incident of that international or external sovereignty which, as I have found, was reposed in the national government from the time of independence.

Following the end of the war for independence the Congress of the Confederation negotiated the Peace Treaty of 1783 with the British government through commissioners which the Congress appointed and instructed. In these negotiations, in addition to the lands west of the Appalachian Mountains, the commissioners were particularly concerned with preserving the common right of Americans to the rich fisheries of the seas off Newfoundland and Nova Scotia. The Treaty secured these fishing rights to all Americans, not merely to the citizens of particular states. The Treaty also granted the United States all islands within 20 leagues of its shores. Since that distance is greater than that specified with respect to coastal islands in the charter grants of most of the colonies, but less than that mentioned in the Virginia charter, it is clear that the commissioners were seeking a uniform island claim for the United States rather than pressing the separate island claims of the individual states. The defendant States assert that this grant of islands included a grant of the intervening sea and seabed which extended the territorial limits of the coastal states out 20 leagues into the sea, but, as this Court said in *United States v. Louisiana,* 1960, 363 U.S. 1, 68, "it is hardly conceivable that this provision of the Treaty was intended to establish United States territorial jurisdiction over all waters lying within 20 leagues (60 miles) of the shore."

The United States contends that if the defendant States did obtain rights to the sea and seabed adjacent to their coasts either through their early charters and grants or from the crown in 1776 when they became independent, neither of which I have found to be the fact, they lost these rights to the United States through their ratification of the Constitution of 1787 and the exercise by the United States of its constitutional authority over foreign affairs. Certain it is that any doubt as to whether after independence the United States under the Continental Congress and under the Congress of the Confederation possessed the

attributes of external sovereignty, including the power to conduct foreign affairs, was resolved and those attributes were confirmed in the federal government by the Constitution of 1787. If we assume, *arguendo*, that the defendant States did acquire seabed rights, as they claim they did, and retained them during the Confederation period, I think that it would have to be concluded that these rights were lost to the United States upon their ratification of the Constitution and that the contention of the United States in this regard would have to be upheld. For, as we have seen, this Court has ruled that such rights belong to the holder of external sovereignty, *United States v. California*, 1947, 332 U.S. 19, 38-39; *United States v. Texas*, 1950, 339 U.S. 707, 718, and pass with the transfer of sovereignty from one holder to another, *Massachusetts v. New York*, 1926, 271 U.S. 65, 89. Moreover, in the *Texas* case this Court held that this is exactly what happened to Texas' claims to seabed rights when it was admitted into the union.

6. THE POST-1787 PERIOD

(a) Recognition of the territorial sea

As I have heretofore indicated, I do not find that either the colonies or the crown made any claim to sovereignty over or ownership of the sea or seabed off the coast of the colonies in the period immediately prior to independence. Accordingly, no such right passed either to the states or to the federal government at independence or under the Treaty of Peace. But as we have seen the concept of a narrow belt of marginal sea within cannon shot of the shore, later equated with three miles, over which the littoral state could exercise jurisdiction to enforce its neutrality and for other purposes had already then begun to be recognized. The United States very early in its national existence took a leading part in advocating and developing this concept as a three-mile belt of territorial sea within which the adjacent state could enforce neutrality and, as

the doctrine developed later on, exercise virtually unlimited jurisdiction and sovereignty, subject to the right of innocent passage by peaceful foreign vessels, and beyond which the high seas were international waters open to all.

It is true that both Great Britain and the United States have asserted by statute the right to exercise jurisdiction over foreign vessels beyond the three-mile limit, usually out to a distance of 12 miles, to prevent smuggling in violation of their customs laws and to enforce sanitary measures. But these statutes which authorized the exercise of jurisdiction for a special protective purpose only, did not extend the territorial sovereignty of the maritime state to that distance.* It is also true that not all maritime states have limited their own territorial sea to a belt of three miles. Great Britain, the United States and most other maritime nations have adhered to the three-mile limit, however. And it is the fact that during the nineteenth and twentieth centuries the comparatively narrow belt of marginal sea which I have been discussing came to be generally recognized by the nations and in international law as a territorial sea belonging to the adjacent state and in which it could exercise as full sovereignty and dominion as in its upland territory, subject to the right of free passage by peaceful foreign vessels, but beyond which the high seas were common and free to all.† And since under our federal system the United States is the holder of external sovereignty, it was the federal government rather than the states which acquired paramount rights in the newly-recognized territorial sea and full dominion over the

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* The difference between the exercise on the seas of absolute jurisdiction within its territory and of the power to protect itself from injury beyond its territorial limits was early recognized. Marshall, C. J., in *Church v. Hubbart*, 1804, 2 Cranch 187, 234.

† *Convention on the Territorial Sea and the Contiguous Zone Part I*, in force September 10, 1964, 15 U.S.T. Pt. 2 pp. 1606. 1608 et seq.

resources of the seabed under it. *United States v. California*, 1947, 332 U.S. 19, 38-39.

There is in this record evidence of a number of instances in which one or another of the defendant States have asserted rights to the seabed of the marginal sea within the three-mile territorial limit, most of them adjacent to the shore. The defendant States point out that upon various occasions prior to 1947 one or another of them had executed deeds of portions of the seabed of the marginal sea to the United States at the request of officers of the federal government. But, as this Court held in *United States v. California*, 1947, 332 U.S. 19, 39-40, in the absence of a congressional surrender of title such action by its agents could not preclude the United States from asserting its legal rights. Moreover, as the Court pointed out in that case, it was not until the California oil issue began to be pressed in the 1930s that either the states or the federal government had any reason to focus on the question which of them had paramount rights in the three-mile belt. In any event the right to exploit this area, having been confirmed to the defendant States by the Submerged Lands Act, is not involved in the present case. Moreover, the exercise by those states of rights in the three-mile marginal belt defined by the United States and generally recognized as the territorial sea certainly does not imply a claim to an indefinite area seaward of the territorial sea. And I have been referred to no instance in which a defendant State, prior to the discovery of oil and gas under the bed of the continental shelf, made any claims to, let alone occupied, the seabed beyond the three-mile limit. Indeed, it is an admitted fact that from the foundation of the union until very recent times there was no discovery or indication of any exploitable resources in the Atlantic continental shelf more than three miles from the coasts of the defendant States which might have been the basis for such a claim.

It is clear that the extent and limits of the territorial sea were indefinite in the beginning, just as had been the limits of the earlier concept of the narrow seas. Since the territorial sea is physically a part of the high seas, an area in which all maritime nations have always been particularly interested, the maintenance of sovereignty over it has always involved the foreign relations and defense activities of the maritime state in a very special sense. Its extent and limits have been dependent upon the successful conduct by that state of its foreign relations and defense. Accordingly, even if we assume *arguendo* that the defendant States did acquire in some manner and continued to have jurisdiction and sovereignty over the marginal seas, the geographical extent and limits of that jurisdiction were necessarily subject to the actions of the federal government in defining the extent of the American territorial sea in the course of exercising the foreign relations and defense powers which the states had entrusted to it. As we have seen, the federal government did define those limits as three miles seaward of the coast and secured very general international acceptance of that definition. I am satisfied that by this action the federal government effectively limited to the three-mile belt any possible claim of the defendant States to the resources of the seabed adjacent to their coasts. The defendant States argue, however, that in so doing the federal government took part of their territory, which it had no constitutional power to do. But defining in the exercise of its constitutional powers an indefinite and previously undefined limit of the claim of a state of the union in the sea is a very different thing from detaching from that state a tract of upland which is clearly within its previously recognized and established boundaries.

(b) The new continental shelf doctrine

President Truman's Proclamation of September 28, 1945, 59 Stat. 884, first claimed for the United States jurisdiction and control over the natural resources of the

subsoil and seabed of the continental shelf contiguous to the coasts of the United States. It opened a new chapter in the international law applicable to this area. For it, and the Convention on the Continental Shelf, in force June 10, 1964, 15 U.S.T. Pt. 1, p. 471, which followed it, assured to each coastal nation the exclusive right to explore and exploit the resources of the seabed and subsoil of the adjacent continental shelf beyond the territorial sea regardless of whether or not the nation had actually occupied or exploited the seabed and subsoil, the resources of which it claimed. Within the limits of the territorial sea that right had come to be generally recognized. But prior to the Truman Proclamation, it was the accepted doctrine of international law, as we have seen, that to be recognized as valid, claims to exclusive rights to the resources of the seabed at least beyond the territorial sea must be based on long enjoyment (prescription) or on actual exploitation (occupation). The state of international law on this subject prior to 1945 is fairly and accurately summed up by Professor Waldock in *The Legal Basis of Claims to the Continental Shelf*, 36 Grotius Society (1951) 115, 118, from which I have already quoted.

The arbitral decision in the *Matter of an Arbitration Between Petroleum Development (Trucial Coast) Ltd., and the Sheikh of Abu Dhabi*, 1 International and Comparative Law Quarterly (1952) 247, appears to be the only judicial precedent relating to the right of a coastal state to seabed resources outside its territorial limits which had been decided before the Convention on the Continental Shelf came into effect. The case involved a claim by Petroleum Development (Trucial Coast) Ltd. to petroleum resources of the seabed beyond the territorial waters of Abu Dhabi under a concession granted in 1939 by the ruler of that sheikhdom. In that case it was argued that the Truman Proclamation and the similar proclamations by a number of other nations were the expressions of principles which were already a part of international law and should, there-

fore, be applied to uphold the exclusive rights of the Sheikh to the seabed of the continental shelf adjacent to the territorial waters of his sheikhdom. It was also argued that the established rule of international law was set out in draft articles on the subject which had been prepared by the International Law Association and the International Law Commission for the consideration of the then impending United Nations Conference on the Law of the Sea. The umpire, Lord Asquith of Bishopstone, rejected these contentions, holding that the proclamations and draft articles thus relied on were merely tentative and exploratory and that the proposition that the coastal state has exclusive rights in the bed of the continental shelf had not yet assumed the definitive status of an established rule of international law. Lord Asquith accordingly held that under the then existing rule of international law the Sheikh of Abu Dhabi did not have exclusive rights in 1939 to the resources of the subsoil of the Continental Shelf beyond his territorial sea which could have passed in that year under his concession to Petroleum Development (Trucial Coast) Ltd. The defendant States argue that since this proceeding was merely an arbitration and not a judicial proceeding it is not evidence of the pre-1945 international law on the subject. I cannot agree. On the contrary, I am satisfied that international arbitrations such as this are properly held to be evidence of the existence of the rules of international law which they apply. As such they have been relied on frequently by the courts. Thus the Abu Dhabi arbitration itself was cited by the Supreme Court of Canada in *Reference Re Ownership of Off-shore Mineral Rights of British Columbia*, [1967] Canada L.Rep. 792, 65 D.L.R. (2d) 353, 376, for the proposition that in 1939 the rule that coastal states had exclusive rights to the bed of the continental shelf did not exist as a legal doctrine, the very proposition with which we are here concerned.

The defendant States urge that even if they had no rights in the seabed of the continental shelf prior to 1945 and the exclusive rights thereto claimed by the Truman Proclamation sprang into existence for the first time upon its promulgation, as I find that these rights did, they should nonetheless prevail, under our constitutional system, in view of their sovereignty over the adjacent coast. In the light of the Ninth and Tenth Amendments and more basically in view of the nature of our federal system, they argue, the federal government has only such powers, sovereignty and territory as have been granted to it by the states, all residual powers, sovereignty and territory being retained by the states. This proposition must, of course, be conceded. The real question, however, is whether the powers, sovereignty and territory granted to the federal government included these newly claimed rights in the seabed of the continental shelf. But this Court in *United States v. California*, 1947, 332 U.S. 19, 34-35, has held that the rights to the seabed of the territorial sea belong to the federal government under the Constitution rather than to the states, and in *United States v. Louisiana*, 1950, 339 U.S. 699, 705, that *a fortiori* the ocean beyond the three-mile belt of territorial sea is in the domain of the nation rather than that of the separate states. The defendant States concede that in order to sustain their position in this regard this Court must overrule those cases, which they urge were wrongly decided. However, if this is to be done it must be done by the Court itself, not by its special master. Unless and until these cases are overruled I regard myself as bound by the rule of law which they enunciate. I, therefore, cannot accept this contention of the defendant States.

(c) Validity of the Submerged Lands Act

The defendant States further argue that they are, at the very least, constitutionally entitled to seabed rights within their recognized historic boundaries out to three

leagues from the shore. They base this argument upon the fact that under the Submerged Lands Act such rights, upon proof of historic boundaries, were granted to the states bordering the Gulf of Mexico and that to deny the Atlantic states a similar right to the resources of the continental shelf within historic boundaries out to three leagues is to discriminate against them without a rational basis and thus to deny them their constitutional right to an equal status in the union with the Gulf states. With respect to this contention, it is sufficient to point out that the "equal footing" doctrine applies only to political rights, not to property rights. The seabed rights which the defendant States claim are clearly property rights which are subject to such disposition as the Congress of the United States in the exercise of its unreviewable discretion sees fit to make of them. It was expressly so held by this Court in *Alabama v. Texas*, 1954, 347 U.S. 272. That case is conclusive on this point, unless overruled, as the defendant States urge that it should be. But here again this is for the Court itself, and not for its special master, to decide. Moreover, in any event the defendant States have made no showing that they ever expressly claimed seaward boundaries of three leagues or more. The most that can be said in this regard is that some of them at various times since 1789 have enacted statutes establishing a three-mile boundary in the marginal sea* the same boundary which the Submerged Lands Act confirmed to all of them in 1953.

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* *Massachusetts* 1859 (Stat. 1859, ch. 289, as amended, Mass. Gen. Laws Ann. ch. 1, § 3); *Rhode Island* 1872 (R.I. Gen. Stat. 1872, Tit. I, ch. 1, § 1); *New Hampshire* 1901 (N. H. Laws 1901, c. 115); *New Jersey* 1906 (N. J. Stat. Ann. Tit. 40, § 18-5); *Georgia* 1916 (Acts 1916, p. 29, Ga. Code Ann. § 15-101). See *United States v. Louisiana*, 1960, 363 U.S. 1, 21 fn. 22. See also North Carolina 1947 Sess. L., c. 1031, N. C. Gen. Stat. § 141-6.

7. The Individual Defenses of Rhode Island and North Carolina

These two defendant States urge, as do the others, that they became wholly independent states in 1776 and, as such, entitled to the seabed rights they claim. With this contention I have already dealt. In the cases of Rhode Island and North Carolina, however, there is an additional factor. Neither of these two States had ratified the Constitution by March 4, 1789 when the government which it established became operative. In fact North Carolina did not ratify the Constitution until November 21, 1789 and Rhode Island not until May 29, 1790. The point urged is that, in any event, during those intervening periods of time each of these States was wholly independent, both internally and externally, since the confederation of which they had been members had ceased to exist and they had not yet joined the new union. I do not think that this contention is valid. There is no evidence that either Rhode Island or North Carolina had withdrawn from the union of states formed by the Articles of Confederation of which it was a member, or that the union had been dissolved by the Constitution which was designed not to dissolve but to perfect it. The Congress during this period recognized North Carolina and Rhode Island as a part of the United States and in its legislation distinguished them from foreign states, kingdoms and countries. Act of July 31, 1789, 1 Stat. 48 §§ 38, 39; Act of September 16, 1789, 1 Stat. 69, §§ 2, 3. There is no evidence that Rhode Island or North Carolina were recognized as externally sovereign States by foreign nations then or at any later time. Moreover, even if Rhode Island and North Carolina, like Texas, had possessed external sovereignty which included seabed rights, those rights would have passed to the United States when those States ratified the Constitution, just as happended in the case of unquestionably independent Texas. *United States v. Texas*, 1950, 339 U.S. 707.

8. The Individual Defense of Georgia

Georgia asserts as an individual defense that it is entitled to the resources of the seabed beyond three miles under its boundary settlement agreement of 1802 with the United States by which it ceded its western lands to the United States and the United States in turn ceded to Georgia its title to any lands within the United States lying east of those western lands and south of the southern borders of Tennessee, North Carolina and South Carolina. I have fully discussed this defense earlier in this report in connection with my consideration of the pending motion of the United States for judgment and need not repeat that discussion here. Suffice it to say at this point that I find no merit in this contention.

9. Request for Accounting

In the complaint the United States alleges that the State of Maine has purported to grant exclusive oil and gas exploration and exploitation rights in submerged lands in the Atlantic Ocean in the area in controversy and it asks for an accounting for all money derived therefrom. In its answer the State of Maine admits that it has granted to a private corporation a conditional license to explore for minerals, oil and gas in, and to take the same from, certain submerged lands in the Atlantic Ocean some portion of which may lie more than three miles seaward from the coast line. It does not appear, however, that the corporation to which the State of Maine granted this license has actually engaged in any exploration or exploitation under it or made any payments under it to the State. Nor has the United States at the hearing or in its briefs pressed its request for an accounting. It would, therefore, appear that no accounting need be ordered at this time.

D. CONCLUSIONS

Throughout the preceding discussion I have stated my findings with respect to what appear to be the pertinent facts involved in the proceeding. I shall, therefore, not restate these findings at this point, but merely state the conclusions to which I have been led by my consideration of the facts and the relevant principles of law involved.

1. English law prior to the accession of the Stuart dynasty in 1603 did not recognize ownership by the crown of the seabed and subsoil of the narrow or English seas.

2. The sovereignty claimed by the crown prior to 1603 in the English seas was protective and not territorial in nature.

3. In the seventeenth century under the Stuart dynasty the crown not only claimed sovereign jurisdiction but also a right of property in the English seas and their seabed and these claims were recognized at that time in English law.

4. Claims of the crown to exclusive fishery rights in the English seas did not, except during the Stuart era, involve claims to the ownership of the seabed of those seas.

5. The jurisdiction in admiralty claimed and exercised by the English crown on the high seas in the centuries prior to 1776 and the right of the flag enforced by it were of a protective nature and were not exercised territorially in the so-called English or narrow seas.

6. The rights of the crown to emerged or relicted lands and to royal fish, wreck, treasure trove, flotsam, jetsam and lagan were based, during the centuries preceding 1776, on its claim, under its prerogative, to ownerless property, although, during the Stuart period, some of these rights were also based on the claim of the crown to ownership of the seabed.

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7. Following the end of the Stuart dynasty in 1688 and in the course of the eighteenth century, the right of the crown to the sovereignty of the English seas became more and more an anachronism and it was allowed to die out from practical affairs, so that before 1776 it had become obsolete and had been abandoned as a principle of English law. With it disappeared the earlier claim of the crown to ownership of the seabed of the English seas.

8. In the eighteenth century there arose a wholly new concept of a comparatively narrow belt of marginal sea lying within the range of cannon shot from the shore in which a coastal state might exercise sovereignty to enforce its neutrality and for other purposes. By 1776 this concept was beginning to be recognized in English law.

9. Early in the nineteenth century the width of this marginal or territorial sea, as it came to be called, was defined by the United States, Great Britain and many other maritime nations as three geographical miles and within it the sovereignty of the coastal nation is now recognized as supreme, subject to the right of innocent passage by peaceful foreign vessels.

10. Except for the extravagant claims of the Stuart kings to ownership of the entire seabed of the English seas, claims which died with the end of their dynasty, the law of England prior to 1783, in conformity with international law, recognized claims to the ownership of the seabed only on the basis of prescription or actual occupation by the claimant.

11. During the nineteenth and twentieth centuries ownership of the bed of the territorial sea came to be generally recognized without regard to prescription or actual occupation.

12. The charters given to the companies and individuals who were the proprietors and founders of the colonies which later became the defendant States granted

territory on the mainland bounded by the Atlantic Ocean but did not grant maritime sovereignty or dominion over a territorial sea, a concept then unknown, or property rights in the seabed or its resources.

13. The colonial activities in their marginal seas prior to 1776 were almost entirely limited to fishing in waters close to shore involving the use of shore-based facilities and to the regulation of these and other activities as carried on by the colonists therein. They did not involve any claim to ownership of the seabed.

14. The admiralty jurisdiction exercised by colonial admiralty courts prior to 1696 and by royal courts of admiralty sitting in the colonies after that date was not territorial in nature.

15. Colonial law and practice prior to 1776 do not support the claim that property rights to the seabed of the marginal sea seaward for 100 miles or any lesser distance had been granted to the colonies or that such rights were exercised by them except in a few cases where portions of the seabed within the three-mile limit were actually occupied.

16. When in 1776 the American colonies achieved independence and when in 1783 the Treaty of Peace was concluded neither the crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast, except for those limited areas, if any, which they had actually occupied.

17. From and after July 4, 1776, the date of independence, the United States of America, under the Continental Congress, under the Articles of Confederation and under the Constitution, constituted a union of internally independent states with a national government to which were delegated certain powers including the powers associated with external sovereignty such as the conduct of foreign relations, of defense and of foreign commerce.

18. If the English crown in 1776 had any remaining rights to sovereignty of the marginal seas and ownership of the seabed off the coasts of the colonies, which I do not find that it did have, those rights would have passed at independence and under the Treaty of Peace of 1783 to the national government as the holder of the external sovereignty of the United States and not to the several states.

19. If the states in 1789 had any rights to sovereignty of the marginal sea and ownership of the seabed off their coasts which they had received in any manner, which I do not find that they did have, those rights would have been lost to the national government upon their ratification of the Constitution.

20. Sovereign jurisdiction of the three-mile belt of territorial sea and ownership of its seabed became vested in the United States, rather than in the states, when, after 1776, the concept of the territorial sea was recognized and its extent defined by the national government.

21. The preponderance of the evidence in the present proceeding confirms the accuracy of the following statements of historical fact made by this Court in *United States v. California*, 1947, 332 U.S. 19, 31-33:

> "It would unduly prolong our opinion to discuss in detail the multitude of references to which the able briefs of the parties have cited us with reference to the evolution of powers over marginal seas exercised by adjacent countries. From all the wealth of material supplied, however, we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it. *Cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316.

"At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. Some countries, notably England, Spain, and Portugal, had, from time to time, made sweeping claims to a right of dominion over wide expanses of ocean. And controversies had arisen among nations about rights to fish in prescribed areas. But when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion. Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth.

"It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality. Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world, although as late as 1876 there was still considerable doubt in England about its scope and even its existence. See *The Queen v. Keyn*, 2 Ex. D. 63. . . ."

22. Prior to the Proclamation of September 28, 1945 by President Truman, 59 Stat. 884, rights to the resources of the seabed beyond territorial waters could be obtained only

on the basis of prescription or actual occupation and neither the United States nor the defendant States had made any such claim.

23. The Truman Proclamation of 1945 for the first time claimed for the United States jurisdiction and control over the natural resources of the subsoil and seabed of the continental shelf beyond the three-mile limit of the territorial sea off the coasts of the United States. The Proclamation initiated a new rule of international law in this regard.

24. This claim was validly made by and on behalf of the United States under its powers of external sovereignty and did not inure to the individual benefit of any of the Atlantic coastal states.

25. By the Submerged Lands Act of May 22, 1953, 67 Stat. 29, the United States confirmed to and vested in the defendant States the seabed and the resources of the territorial sea within three geographical miles of their respective coastlines. The right to the resources of the seabed in these areas being now vested in the defendant States, claims with respect thereto are not involved in this proceeding.

26. The Submerged Lands Act of 1953 validly limited to a width of three geographical miles the marginal band of sea the seabed of which it confirmed and vested in the defendant States, even though the Act granted to the states situated on the Gulf of Mexico seabed rights within their recognized historic boundaries out to three marine leagues.

27. Under the Truman Proclamation, the Outer Continental Shelf Lands Act of 1953, and the Convention on the Continental Shelf of 1964, the United States has the right, as against the defendant States, to the resources of the seabed and subsoil of the continental shelf beyond the three-mile limit of territorial sea off the Atlantic coast.

28. The States of Rhode Island and North Carolina were not wholly independent nations and did not have external sovereignty during the period between the operative date of the federal government under the Constitution and the subsequent dates when they, respectively, ratified the Constitution.

29. The State of Georgia did not acquire the resources of the seabed under its boundary settlement of 1802 with the United States.

30. Since it does not appear that any exploration or exploitation of the bed of the continental shelf has been carried on by the licensee of the State of Maine or that any payments have been made by it to that State, an accounting by that State to the United States in that regard is not now required.

31. The United States is entitled to judgment in this proceeding.

32. The costs of suit, including the expenses of the special master, should be borne by the twelve defendant States in equal shares.

E. RECOMMENDED DECREE

In accordance with my findings and conclusions I recommend the entry of a decree in the following form:

It is now Ordered, Adjudged and Decreed as follows:

1. The United States is entitled as against the defendant States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia to that portion of the seabed and subsoil, and the natural resources thereof, underlying the Atlantic Ocean and lying more than three geographical miles seaward from the coast line, that is, the line of ordinary low-water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, out to the edge of the continental shelf.

2. The costs of this suit, including the expenses of the special master, shall be borne by the twelve defendant States in equal shares.

The foregoing report is respectfully submitted.

ALBERT B. MARIS
Special Master

Philadelphia, Pa.
August 27, 1974

F. APPENDIX

1. Consolidated and Revised Procedural Order as Amended

The special master having entered prehearing orders on July 28, 1970, October 27, 1970, and January 8, 1971 and an order on May 24, 1971 amending the order of July 28, 1970 in the above entitled case, and the Supreme Court having on June 28, 1971 severed the State of Florida from the case for all purposes so that that state is no longer a party, it is appropriate to revise the said orders to reflect the severance of the State of Florida from the case and to consolidate them into a single procedural order. To that end It Is Ordered:

Testimony of Expert Witnesses; Preparation

1. The testimony in chief of expert witnesses, including their statements of their training, experience and qualifications, shall be reduced to writing, preferably in question and answer form, and copies thereof shall be furnished to the special master and to counsel for the other parties not less than four weeks prior to the commencement of the hearing at which the witnesses are to be called upon to testify. All parties entitled to cross-examine a witness shall have the right to defer his cross-examination for a reasonable period of time, to be determined in each instance by the special master, in order to afford such parties an opportunity to study the testimony of the witness and to prepare for his cross-examination, except where such an opportunity is manifestly not required. All parties entitled to cross-examine a witness shall notify the proponent and the special master not later than one week prior to the commencement of the hearing at which his testimony is to be given whether they expect to cross-examine the witness at the conclusion of his direct testimony or to defer his cross-examination until a later session.

Exhibits; Documents; Distribution

2. Copies of exhibits proposed to be offered in evidence by a party or parties shall be furnished to counsel for the other parties at least four weeks prior to the commencement of the hearing at which the exhibits are to be offered in evidence. An exhibit comprising a handwritten document shall be accompanied by a typewritten or printed copy and an exhibit comprising a document written in a language other than English shall be accompanied by an English translation, certified in each instance by the custodian or translator, if practicable. In the case of exhibits which can readily be reproduced the United States shall furnish one copy to counsel for each of the states and the states shall furnish two copies to counsel for the United States and one copy to counsel for each of the other states. In the case of an exhibit which cannot be reproduced in numbers without undue expense, a single copy may be furnished to opposing counsel (in the case of the states to Covington and Burling, Esquires, common counsel for nine of the states, who have been designated by all of the states to receive such exhibits on their behalf), provided it is so furnished at least one month prior to the commencement of the hearing at which the exhibit is to be offered in evidence. All parties offering exhibits, other than those referred to in the fourth sentence of this paragraph, shall furnish one copy to the special master in addition to the original exhibit.

3. The States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland and Virginia having retained Covington and Burling, Esquires, of Washington, D. C., as common counsel in this suit, prepared testimony, proposed exhibits and other documents and papers required to be furnished to counsel for other parties shall be furnished to Covington and Burling, Esquires, as well as to the Attorneys General of the nine states which they represent.

4. Except with respect to an exhibit referred to in the fourth sentence of paragraph 2, at the time an exhibit or other document is submitted to the special master by any party or parties, the party or parties submitting it shall furnish a copy to counsel for each other party (two copies to counsel for the United States), unless copies thereof have been furnished to counsel previously as provided by this order.

5. All copies of exhibits or other documents furnished to counsel for other parties under the provisions of this order shall be of the same kind and quality as the exhibits or documents which are submitted to the special master.

Designation of Exhibits

6. Exhibits shall be numbered by the parties for identification prior to being furnished to opposing counsel and offered in evidence. Exhibits offered in evidence by the United States shall be so designated and shall be numbered consecutively thus: "United States Exhibit No. ". Exhibits offered in evidence by the parties shall be designated with the name of the party and shall be numbered consecutively for each party thus: "Maine Exhibit No. ", or as the case may be. Exhibits offered in evidence by Covington and Burling, Esquires, as common counsel for nine of the parties shall be designated thus: "Maine et al Exhibit No. ", and shall be numbered consecutively.

Authentication of Exhibits; Effect; Objections

7. Copies of documents may be offered for introduction into evidence in lieu of originals. The authenticity of a document or the accuracy of a copy need not be proved if copies of the document have been submitted to all counsel for the parties as provided in paragraph 2 and if no party, at least two weeks prior to the commencement of the hearing at which the document is to be offered in

evidence requests the proponent to prove the authenticity of the document or the accuracy of the copy. Any party may, however, controvert by evidence the authenticity of such a document or the accuracy of a copy of it at any time.

8. An exhibit offered in evidence by a state or states shall be regarded as offered on behalf of all the states unless in the case of a particular exhibit a state notifies counsel for all the other parties and the special master that it does not rely upon the exhibit.

9. An objection made by one party to the testimony of a witness or to the admission of an exhibit shall be available to all other parties on the same side of the case without specific reference to them or reservation by them of the right to rely thereon. The special master will ordinarily rule upon objections to evidence or exhibits at the time the objections are made with leave to the objecting party, in case an objection is overruled, and if so advised, to make a motion to strike the testimony or exhibit after the examination and cross-examination with respect thereto have been completed.

Judicial Notice

10. A party proposing to ask the special master to take judicial notice of a document or other fact shall notify counsel for the other parties of such intention at least two weeks prior to the commencement of the hearing at which the request is to be made. If judicial notice of a document is involved, the notification to counsel for the other parties shall be accompanied by a copy of the document, if practicable.

11. All documents that are subject to judicial notice, copies of which are furnished to the special master and to counsel for convenience, shall be designated in the same manner as documents which the parties seek to offer for

introduction into evidence. The designation as exhibits of documents that are subject to judicial notice will in no way enhance their probative effect, however.

Reporter; Transcript of hearings

12. The parties have agreed to employ a competent reporter to report the special master's hearings. The parties will make their own arrangements with the reporter for the number of copies of the transcript, daily or otherwise, which each of them desires for its own use. In addition, the parties will arrange with the reporter to provide one copy of the transcript for the use of the special master in addition to the original provided for ultimate filing in the Supreme Court. The parties have agreed that Bruce C. Rashkow, Esq., and Elias Abelson, Esq., shall serve as a committee to supervise the work of the reporter and to provide for making necessary corrections in the preliminary transcript. All proposed corrections of the preliminary transcript shall be submitted to the committee within such time as may be directed by the committee or ordered by the special master.

Business Committee

13. The parties have agreed that physical arrangements, necessary personnel, financial arrangements and other administrative matters involved in the conduct of the hearings in these cases shall be dealt with on their behalf by a business committee consisting of Bruce C. Rashkow, Esq. for the United States, Robert G. Fuller, Jr., Esq. for the State of Maine, David H. Souter, Esq. for the State of New Hampshire, Kevin P. Curry, Esq. for the State of Massachusetts, W. Slater Allen, Jr., Esq. for the State of Rhode Island, Julius L. Sackman, Esq. for the State of New York, Elias Abelson, Esq. for the State of New Jersey, Jerome O. Herlihy, Esq. for the State of Delaware, Henry R. Lord, Esq. for the State of Maryland, Gerald L. Baliles,

Esq. for the State of Virginia, Jean A. Benoy, Esq. for the State of North Carolina, Edward B. Latimer, Esq. for the State of South Carolina, and Alfred L. Evans, Jr., Esq. for the State of Georgia. Robert G. Fuller, Jr., Esq. has been appointed chairman and Bruce C. Rashkow, Esq. co-chairman of the committee. It has been further agreed that the special master may confer from time to time with respect to any such matters with the chairman or co-chairman of the committee who will take them up with the committee for action.

Requests for Findings and Conclusions
[as amended March 7, 1974]

14. At times hereafter to be fixed by the special master following the close of the hearings, the parties shall submit to the special master their requests for findings of fact and conclusions of law and the special master before filing his report with the Court may submit a draft of his proposed findings of fact to counsel for all parties for the purpose of receiving their suggestions with respect thereto.

Prior orders rescinded

15. The prehearing order of July 28, 1970, as amended by the order of May 24, 1971, the second prehearing order of October 27, 1970, and the third prehearing order of January 8, 1971 are rescinded.

ALBERT B. MARIS
Special Master

August 27, 1971